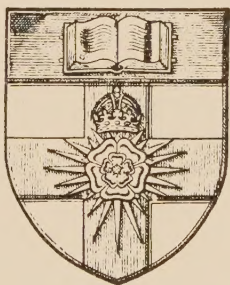


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CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

In re ANCHOR LINE (HENDERSON BROTHERS),
LIMITED.

[No. 00278 of 1935.]

C. A.
1936
June 30.

Contract—Sale of goods—Sale of crane in deliverable condition—Delivery to purchasing company—Deferred payment—Annual payments for “interest and depreciation”—Whether property in crane passed—Winding-up of company—Sale of assets by liquidator—Liquidator treated as adopting contract—Right of vendors to balance of purchase-money—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 17, sub-ss. 1, 2; s. 18, r. 1; s. 25.

By a contract contained in letters the purchasing company agreed with the vendors' agents to buy a crane “for a deferred purchase price of 4000*l.*” The contract provided for annual payments by the purchasing company for “interest” and “depreciation” respectively, to be deducted from the 4000*l.* In the meantime the purchasing company were to have “entire charge and responsibility” for the crane. Three years later, and before payment of the whole of the purchase price, the purchasing company went into voluntary liquidation and the liquidator entered into a contract, which was shortly afterwards confirmed by the Court, for the sale of the assets to a new company. In the liquidation the vendors contended that the property in the crane had not passed to the purchasing company and therefore that it was not included in the assets sold to the new company and claimed that the liquidator must either accept the obligations arising and continue the instalments payable under the contract or return the crane to the vendors. The liquidator rejected these claims. Eve J. held that the property in the crane passed to the purchasing company on the making of the contract, in accordance with r. 1 of s. 18 of the Sale of Goods Act, 1893.

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On appeal:—

Held, that s. 18 of the Act applied only “unless a different intention” appeared, and that, reading the contract as a whole, a different intention did appear—namely, that the property in the crane should not pass until the purchase was completed by payment of the purchase price.

Held, therefore, in the circumstances of the case, that the liquidator must be taken to have determined to carry out the contract and to make use of it for the purposes of the liquidation. He was accordingly bound to pay the balance of the purchase-money due to the vendors under the contract.

Kirkham v. Attenborough [1897] 1 Q. B. 201 applied.

Decision of Eve J. [1936] Ch. 211, reversed.

APPEAL from a decision of Eve J. (1)

The Ocean Steamship Company, Ltd., before July, 1931, occupied a berth at Yorkhill Basin, Glasgow, where they had a 30-ton electric coaling crane. They left that berth in July, 1931, and later on it was taken over by the Anchor Line (Henderson Bros.), Ltd. In February, 1929, negotiations were commenced for the purchase of the crane by the Anchor Line Company. Some delay took place in allocating the berth to the Anchor Line Company, and until this was done that company would not enter into any contract. In July, 1931, the Anchor Line Company suggested that they would take over the crane on a rental basis with the option of purchase. Messrs. Alfred Holt & Co., the agents of the Ocean Company, wrote: “We suggest your making a deferred payment for the crane rather than renting it with an option of purchase, as you propose.” After further correspondence, Messrs. Alfred Holt & Co. wrote a letter to the Anchor Line Company on September 3, 1931, the material portion of which was as follows:—

“Referring to the conversations which Mr. S. W. Ellis had with Mr. A. C. F. Henderson yesterday, we have pleasure in confirming the arrangement then come to with regard to the 30-ton electric crane at Yorkhill Basin.

(1.) We agree that you take over the crane, coaling cradle and carriage and the electric cable serving the crane for a deferred purchase price of 4000*l.*

(1) [1936] Ch. 211.

(2.) Until the completion of the purchase you agree to pay us for interest and depreciation at the rate of 350*l.* per annum for the first two years after taking over, 450*l.* per annum for the next two years, and 400*l.* per annum thereafter.

(3.) Of these sums a proportion amounting to 240*l.* per annum or 6 per cent. of the purchase price of the crane is to be regarded as depreciation, and the total of these annual payments for depreciation is to be deducted from the above mentioned amount of 4000*l.*, in order to arrive at the balance actually to be paid by you on completion of the purchase whenever that may take place.

(4.) In the meantime you will have entire charge of and responsibility for the crane in every respect.

We suggest that the payments be made quarterly and that the date for your taking over the crane be fixed as from September 5, 1931."

The Anchor Line Company, by letter of September 4, 1931, to Messrs. Alfred Holt & Co., confirmed the arrangement and said they were prepared to take delivery of the crane on September 5, 1931. Between September, 1931, and March, 1935, the Anchor Line Company made regular quarterly payments to Messrs. Alfred Holt & Co., at first of 87*l.* 10*s.* and later of 112*l.* 10*s.*, the total of which amounted to 1400*l.*

In April, 1935, the Anchor Line Company passed a resolution for winding-up voluntarily. On May 1, 1935, a petition was presented to the High Court for compulsory winding-up of the company, and on May 13 a compulsory order was made thereon.

In the meantime, on May 11, the Official Receiver, who had been appointed provisional liquidator, entered into a contract to sell all the assets of the Anchor Line Company to a new company, Anchor Line (1935), *Ld.* The assets included "thirdly all the movable plant machinery cranes of every description . . . belonging to the old company and used in connection with the said business." This agreement was shortly afterwards sanctioned by the Court.

On June 14 the present liquidator was appointed. Messrs. Alfred Holt & Co. contended that the property in

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C. A. the 30-ton electric crane had not passed to the Anchor Line Company, and therefore was not included in the assets sold to the new company. They claimed that the liquidator must either accept the obligations arising and continue the instalments payable under the contract or return the crane to the Ocean Company. The liquidator rejected these claims.

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The applicants issued this summons asking the Court to reverse the liquidator's decision and to make a declaration that the property in the crane had not passed to the Anchor Line Company.

Eve J. held that the property in the crane passed to the purchasers on the making of the contract, in accordance with r. 1 of s. 18 of the Sale of Goods Act, 1893.

The Ocean Company appealed. The appeal was heard on June 30, 1936.

Maxwell Fyfe K.C. and *B. E. Nield* for the appellants.

W. P. Spens K.C. and *Philip Sykes* for the respondents.

The arguments in the Court below were substantially repeated.

LORD WRIGHT M.R. This is an appeal from a judgment of Eve J. on an originating summons taken out by the applicants, the Ocean Steamship Company, Ltd., under sub-s. 5 of s. 192 of the Companies Act, 1929. The applicants were aggrieved by the decision of the liquidator, to the effect that they were not entitled to the relief which they claimed in the facts of the case. In order to appreciate the position it is necessary to go back some years. The applicants had been in occupation of a 30-ton electric crane at Yorkhill Basin at Glasgow. They ceased to occupy the basin and the Anchor Line Company, a company now in liquidation, took their place and entered into occupation of that berth, and it had to be determined what was to happen to the crane. There were negotiations for some time. I do not intend to refer to the negotiations because I think they are not admissible.

The question really turns on the true construction of a

document which admittedly contains the terms of the contract and is expressly accepted as such in an answer of the Anchor Line dated September 4, 1931. The document is in these terms: [His Lordship read the document and continued:] The Anchor Line Company went into liquidation, a petition having been filed by the Union Bank of Scotland to wind it up. On May 1, 1935, the Official Receiver was appointed provisional liquidator. On May 11 the Official Receiver agreed to sell all the assets of the company including expressly this very crane for a lump sum. The order to wind up was not made until May 13; and thereafter the Court confirmed the agreement for sale, which was duly carried into effect within a few days. On June 14 the present liquidator was appointed. Under those circumstances the claim which is made is that the liquidator as representing the company is liable for the dealing with the crane in the way which I have stated and the question to be determined first of all, in order to ascertain the position, is whether under the contract of September, 1931, the property in the crane did or did not pass to the Anchor Line Company. If it did then a question will arise as to what are the resulting rights and remedies available against the liquidator. I shall consider first the question of the effect of this agreement.

If one looks at the Sale of Goods Act, 1893, the essentially material section to my mind is s. 17, sub-s. 1, which states: "Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred"; and sub-s. 2 is: "For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." In s. 18 certain specific rules are stated which are to apply, but, as I understand this case, that section does not apply here because, in my judgment, it can only apply according to its terms "unless a different intention appears." That refers back to s. 17, and, as I construe the contract, a different intention does appear. I find in the contract, read as a whole, a clear intention that

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*In re.*Lord Wright
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C. A. the property should not pass until the purchase is completed.
 1936 The transaction, as I understand, was simply this: the
 ANCHOR crane being on the berth occupied by the Anchor
 LINE Line Company was in their occupation: they wanted it in
 (HENDERSON order to use it in the course of their ordinary business.
 BROTHERS), LD.,
In re. It was a chattel and not a fixture to the realty, but I use
 Lord Wright the word "occupation" for convenience in the sense that
 M.R. they were possessing and using it. They wanted to possess
 and use it. They were not, however, prepared there and
 then to pay the price for the crane—namely, 4000*l.* They
 entered therefore into this agreement, which was to operate,
 according to its language, "in the meantime" that is to say—
 at the time they were in financial difficulties—they were not
 to pay the purchase price at the moment or in one sum,
 but it was to be paid by the arrangement which is specified:
 350*l.* per annum was to be paid for the first two years, 450*l.*
 per annum for the second two years, and 400*l.* per annum
 thereafter. Of those sums I take 350*l.* as the starting amount.
 240*l.*, which was 6 per cent. on the purchase price of the
 crane, was to be regarded as depreciation. That I understand
 to mean this: the crane, being treated as the property of
 the Ocean Steamship Company, was year by year depreciating,
 and according to business practice, they would write off, on
 the footing that it was their property, a sum for depreciation
 year by year, and that would have appeared in their books
 as a debit, but that amount year by year was to be paid over
 to them and paid in that way by the Anchor Line. The
 amount of the purchase price was to be reduced propor-
 tionately just as the crane was being reduced year by
 year in value. That explains, I think, the provision as
 to the payment of depreciation. On the other hand the
 payment appropriated to interest was on a different
 footing. The word "interest" might seem to indicate that
 there was a debt for the whole purchase price, or the balance
 each year of the purchase price, payment of which was forborne
 at interest, and if that were its meaning, then it would be
 rather consistent with the view that the debt of 4000*l.* was
 due and outstanding from beginning to end. But I do not

so regard it ; I think that the word “ interest ” is used here somewhat loosely as indicating a payment year by year in the nature of rent for use and occupation of the crane ; as that was paid on that footing it was not to go in reduction of the 4000*l.* because the Anchor Line were getting value in return—namely, the use of the crane in the meantime. There is a further provision which to my mind is consistent only with the view that the property in the crane was still vested in the sellers. That is the clause, “ In the meantime you ”—that is the Anchor Line—“ will have entire charge of and responsibility for the crane in every respect.” I think that indicates that the Anchor Line had not become owners of the crane, that they were merely bailees, and as bailees were responsible for its safety and for its preservation to the bailors who were the owners—namely, the Ocean Steamship Company.

Finally, I attach very great importance to the language of the conditions of the purchase. The first clause states that the agreement is one “ for a deferred purchase price of 4000*l.* ” “ A deferred purchase price ” might be construed as meaning a price for a deferred purchase or a price for a purchase which was to become complete at once, though the payment of the price was deferred. In that state of ambiguity I attach importance as solving the ambiguity to the immediately following words “ until the completion of the purchase ” and the similar words “ balance actually to be paid by you on completion of the purchase, whenever that may take place.” I agree that these words are not conclusive ; but read in the context in which they are they support the view at which I otherwise arrive, that what we have here is a contract, the intention of which is that there shall be an agreement to purchase, but that agreement shall not be completed or carried out until some time, whenever that may take place, implied in the contract, when the balance of the purchase price is paid, and then, and then only, the property in the crane is to vest in the Anchor Line. That certainly agrees with the business probabilities. But it is always dangerous to rely on business probabilities in

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C. A. construing any contract, because it does not necessarily follow
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ANCHOR I prefer, therefore, to rest my judgment on the construction
LINE which I attach to the terms of the contract, which to my
(HENDERSON mind show an intention within the meaning of s. 17 as to
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That being so, it is necessary to consider what the position now is, and to determine what is the effect of the sale by the Official Receiver on May 11, 1935, confirmed by the Court two days afterwards and eventually carried out by the Official Receiver? In my opinion, having regard to the position occupied by an Official Receiver and the liquidator as officers of the Court, it must be assumed that the intention was to act in accordance with law. Now under an agreement, such as that in question, the purchaser, if I may call him so—the person who has agreed to purchase and who is in possession of the purchased chattel—may transfer, or has at least the physical power of transferring, that chattel to a purchaser. He has, I think, no right to do so until the purchase has been completed by the payment of the balance of the price, but he has the physical means of doing so, of entering into a bargain with a new purchaser; and if that is done, I think it may be assumed that in doing so the intention is to do what is right, and what he does can only be regarded as what is right if it is done with the intention and with the effect of adopting the purchase by paying off the balance there and then when he seeks to transfer the goods. The alternative, of course, would be a claim for conversion. But the applicants are entitled to choose which alternative they prefer, and they have chosen the alternative of treating the case as one in which the Official Receiver has done what he might have done—namely, paid the balance of the purchase price in order to dispose of the chattel as part of the property of the company which he was selling in toto as a going concern. If he had done that then he would have been liable to pay the balance of the purchase price, and that liability is, in my opinion, attached to him in law in the facts of the case. That being so, the

applicants are right in claiming as against the company the balance of the moneys which are due under the contract.

An analogous case, though it is not precisely on the same footing, is *Kirkham v. Attenborough*. (1) That was a case where a person had received goods on sale or return and pledged them and he was treated thereupon as having done an act adopting the transaction, so that the property in the goods passed to him, with the result that the original vendor could not recover from the person with whom they had been pledged, but the person in doing so had treated himself as a purchaser and was liable to pay the price of the goods as if he had done any other act adopting the purchase. I think the same principle applies here and, therefore, that the applicants are right in their claim for the balance of the purchase-money against the liquidator.

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ROMER L.J. I have come to the same conclusion, though I confess not without considerable hesitation. Sect. 18 of the Sale of Goods Act, 1893, provides as follows: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." It follows from that that in the view of the Legislature if under a contract for the sale of specific goods in a deliverable state the time of payment and the time of delivery are both to be postponed, the contract is not a conditional contract. It further follows that in such a contract if postponement of the purchase price and the delivery of the goods can properly be described as a postponement of the completion of the purchase the property will pass on the entering into the contract, although in that sense the completion of the purchase is deferred.

The question, therefore, that one has to consider, in my

C. A. opinion, is whether on this contract the contrary intention
1936 does appear. I agree entirely with the Master of the Rolls
ANCHOR that the word "interest" in this contract has not been used
LINE in its strict sense. That is obvious from this, that the same
(HENDERSON amount of "interest," so-called, continues to be paid, although
BROTHERS), the principal sum on which the interest is being paid diminishes
LD., from time to time and at the end of sixteen years has been
In re. reduced to, I think, about 160*l.*, if the contract were not
Romer L.J. completed before that date. That being so, I have an uneasy
feeling that the probability is that the parties also used the
word "depreciation" in a loose way and did not intend it
to bear its strict usual meaning. On the other hand, the mere
fact that the word "interest" is used in a loose way would
not of itself justify the Court in treating the word
"depreciation" as being used in a loose way, as bearing
other than its primary meaning, especially if the word when
construed in its usual sense is intelligible in the contract.
Now in this contract it is intelligible when used in its strict
sense, and for this reason. Assuming that the property did
not pass to the purchasers on entering into the contract
and that accordingly the contract might not be completed
and the property never pass, in the meantime the crane
would have been in the possession of the purchasers and
when returned and retaken possession of by the vendors
would have suffered in value by reason of depreciation. In
that case if the vendors chose to retake the crane and not
to pursue the purchasers, they would get back the crane and
in the meantime they would have received from the purchasers
a sum sufficient to make up the value of the depreciated crane to
the value that it had at the date of the contract. If the word
"depreciation" is used in the strict sense then I think it
does point strongly to the fact that the parties did not intend
the property to pass upon the execution of the contract,
because it is inconceivable that if the property in the crane
had passed to the purchasers they should pay the vendors
moneys in respect of the depreciation of the crane.

I do not think much assistance is afforded by clause 4 of the
contract. It is in these terms : " In the meantime you "—

that is the purchasers—"will have entire charge of and responsibility for the crane in every respect." That does not in terms throw upon the purchasers, as I read the clause, any enforceable obligation to insure the crane or do anything else towards keeping the crane in repair, and I was inclined at one time to think that that was inconsistent with the view that the vendors were retaining the property in the crane. On the other hand, if the property had passed to the purchasers it is difficult to see why the clause should expressly refer to the fact that the responsibility for the crane was upon the purchasers. It would be natural to assume that it was, if the property had passed to them.

On the whole, therefore, I come to the conclusion that there is a contrary intention within the meaning of the section and that the parties intended the property to pass only when the purchase was completed in the more strict sense of the term; that is to say, at the time when the purchase-money was fully paid. The property therefore remaining in the appellants and never having passed to the company that is now in liquidation, the position at the commencement of the liquidation was this: the appellants were the owners of the crane and could, of course, have proved in the liquidation for any damages they might have sustained by reason of the failure of the company to fulfil the contract of purchase. The liquidator could not be compelled by them—he was under no obligation—to complete the purchase. On the other hand, it might be that the liquidator, the Official Receiver, desired to have possession of the crane for the purposes of his liquidation, and that could be attained by his carrying out the contract, and, in my opinion, in the circumstances that have happened, it must be taken that the liquidator did in fact determine to carry out this contract, that is to say, to make use of the contract for the purposes of the liquidation, and, that being so, he must make the payments due to the vendors under the contract in accordance with the principle of which one example at any rate is to be found in *In re Levi & Co.* (1)

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C. A. For these reasons I agree that this appeal succeeds.

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GREENE L.J. I agree. The contract of September 3, 1931, is not happily worded, but I am unable to read it as a contract for a purchase with the purchase price to be payable by instalments. The conception of a purchase price payable by instalments is a very familiar one, and the parties to this bargain would have had no difficulty in saying that that was what they meant if it had been what they meant. In point of fact the sums which are payable under the contract are split into two categories, one category is described as "interest" and the other category is described as "depreciation." Now the use of the word "depreciation" to my mind is the most significant thing about this document. It seems to me impossible to treat the payments for "depreciation" as being payments in effect of instalments of the purchase price, because had that been the intention the principal sum on which the interest was to be payable would have diminished year by year. Instead of that the principal sum remains constant in spite of these yearly payments; and the true nature of them, as I read the contract, is described by the word "depreciation," subject to this, that if the contract is completed by the payment up of the purchase price, sums paid in respect of depreciation are to be taken into account and treated as part of the purchase price. In other words, those sums when paid are sums paid in respect of depreciation; but, as is a perfectly obvious and sensible and businesslike thing to do—in fact the only thing to do—when the contract is finally completed the purchaser is to be given credit for what he has paid. Now if the contract were not completed those sums would still be of the character which they are expressed to have, namely, depreciation, and the effect would then be this, that the vendor, being entitled to take back the crane, would get into his possession a crane which had depreciated during the period in question and would have in his pocket the yearly sums paid in respect of depreciation, just as, if he had kept the crane himself, he

would have set aside every year out of his own money sums to provide for depreciation. I think myself that the key to the meaning of this contract is to be found in the use of that word and in the machinery of payment, which stands in strong contrast to the ordinary machinery for payment of a purchase price by instalments; and it seems to me that it would be applying wrong principles of construction to give to such a word as the word "depreciation" and such machinery for payment as you find here no sufficient weight.

On the other hand, it is said that the same argument applies (and I think that to a certain extent it does apply) to the use of the word "interest." The use of the word "interest" is, of course, more consistent with the idea of a sum for which the purchaser is to be liable, although payment is to be postponed: but it is to be observed that whichever view were taken of the question in this case payment of some kind would fall to be made by the purchaser. If he was buying then and there and the property passed to him, payment only being postponed, he would be paying, and it would be natural and businesslike that he should be asked to pay, interest in the strict sense. On the other hand, if the property did not pass he would have to make some payment for the benefit that he was receiving day by day from the use of this crane. The parties have used the word "interest," but it seems to me that a payment of some kind, whatever name one gives to it, was an essential part of the transaction, whereas in the matter of "depreciation" "depreciation" stands out of this agreement as something very special and very particular which is not capable of being reconciled with the idea of a purchase by instalments.

On the second part of the case, if the construction of the agreement is what I take it to be, the Official Receiver, when he was appointed provisional liquidator, found himself in this position—and I think he must be deemed to have known what his legal rights were in respect of this matter: he had got a crane and he wished to sell the entire business, he entered into a contract for the sale of the business of which the crane

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formed an important part because it was specifically mentioned in the contract into which he entered, and he obtained the approval of the Court to that contract. It seems to me quite impossible to impute to the Official Receiver any intention except the intention of conferring upon his purchaser a good title to the assets which he was selling to him. The only way in which he could obtain a title to that crane was by paying the purchase-money which was to be paid under the contract, less the sums previously paid in respect of depreciation, and that, according to the true construction of the contract, in my opinion, he could have done at any moment. He could have perfected his title or put himself in a position to confer a good title on the purchaser. That he can do to-day if he pays. One cannot treat this on the footing that the Official Receiver is to be regarded as putting himself in a position where he has not intended to give his purchaser a good title and the only way, therefore, in which he could effectively carry out his intention to make use of this asset for the purpose of a beneficial sale of the company's undertaking was by taking to this contract and paying up in cash what fell to be paid under it. The argument that the proper remedy of the present appellants is to take proceedings against the purchasers appears to me, with all respect, to be rather fantastic, because it would mean an action against the purchasers by the present appellants and then presumably an action by those purchasers against the Official Receiver or the liquidator because they had not got a title to the goods which they had bought. In those circumstances it appears to me that the Official Receiver must be taken by his action to have manifested a clear intention to take to this contract and put himself in a position to give a good title to that crane, a thing which he could only do by payment in full of what remained to be paid.

I agree with the order proposed.

LORD WRIGHT M.R. The result will be that the appeal will be allowed and declarations will be made as regards (1.) and (2.). As regards (3.) I think it ought to read in

this way : “ Declare that the Official Receiver, as provisional liquidator, must be taken to have adopted the said agreement and that the appellants are entitled to be paid out of the assets of the Anchor Company the whole of the moneys payable under the said agreement as though the purchase were completed on the 13th May, 1935.”

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Appeal allowed.

Solicitors : *Sharpe, Pritchard & Co., for Alsop, Stevens & Collins Robinson, Liverpool ; Collyer-Bristow & Co.*

W. I. C.

In re TURNER'S WILL TRUSTS.

DISTRICT BANK, LIMITED *v.* TURNER.

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July 1, 30.

[1935. T. 4028.]

Will—Contingent bequest—Legatee not entitled to vested interest on attaining twenty-one—Death before attaining vested interest—Interim accumulations—Statutory provision for payment of income of legacy to legatee as from his attaining twenty-one—Contrary provision in will prevails—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 31, sub-s. 1 (ii.) ; s. 69, sub-s. 2.

The Trustee Act, 1925, s. 31, sub-s. 1, provides : “ Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—

(i.) During the ~~the~~ infancy ~~of any~~ such person, if his interest so long subsists, the trustees may, at their sole discretion, pay to his parent or guardian . . . or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable . . . ; and

(ii.) If such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property . . . to him, until he either attains a vested interest therein or dies, or until failure of his interest : . . . ”

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Sect. 69, sub-s. 2, provides: "The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument":—

Held, by the Court of Appeal (reversing the decision of Bennett J.) that although the provision in s. 31, sub-s. 1 (ii.), dealing with income of property which does not vest on the beneficiary attaining twenty-one years of age is in terms imperative, it is part of and ancillary to the statutory power of maintenance conferred on trustees by the section, and s. 69, sub-s. 2, therefore applies to this provision, and, in a case where a contrary intention is expressed in the instrument creating the trust, that contrary intention prevails.

In re Spencer [1935] Ch. 533 and *In re Ricarde-Seaver's Will Trusts* [1936] W. N. 146 disapproved.

APPEAL from Bennett J.

By his will dated December 7, 1929, Robert Turner, after appointing executors and trustees and making certain pecuniary and other bequests and giving directions as to the payment of his debts and funeral and testamentary expenses and otherwise, gave by clause 14 thereof the residue of his real and personal estate as to one-fifth part thereof to such of the children of his late son Charles Henry Turner as should be living at his death and should then have attained or should thereafter attain the age of twenty-eight years. Clause 15 was as follows: "I declare that my trustees may apply the whole or such part as they in their discretion may think fit of the income of the expectant or presumptive share of any grandchild of mine in my residuary estate under the trusts hereinbefore contained for or towards his or her maintenance education or benefit during such time as such grandchild shall be under the age of 28 years and may either themselves so apply the same or pay the same to the parent or guardians or guardian of such grandchild or may pay the same to such grandchild personally if he or she shall have attained the age of 21 years and shall during the suspense of absolute vesting of any such share accumulate the surplus if any of the income thereof at compound interest by investing the same and the resulting income thereof in any of the investments hereby authorised

in augmentation and so as to follow the destination of the share from which the same shall have proceeded but with power to apply any such accumulations in any subsequent year for or towards the maintenance education or benefit of the grand-child for the time being presumptively entitled as aforesaid in the same manner as such accumulations might have been applied had they been income arising from the original share in the then current year. . . . ”

The testator died on December 5, 1931, and there were then living three children of Charles Henry Turner, two of whom, the defendants Robert Heap Turner and Doris Heap Lyons, had then already attained the age of twenty-eight years. The remaining child was Geoffrey Heap Turner, who attained twenty-one years of age on August 3, 1931, but died on November 23, 1934, aged twenty-four, a bachelor and intestate. The plaintiffs, the District Bank, Ltd., were the administrators of his estate, and had also become on April 14, 1933, sole trustees of the testator's will.

No part of the income of the one-third of one-fifth share in the testator's residuary estate to which Geoffrey Heap Turner became contingently entitled was applied for his maintenance or benefit, as he had ample income from other sources, and this income had been accumulated and amounted to the sum of 342*l.* 17*s.* 6*d.*

On October 25, 1935, the plaintiffs took out a summons for the determination of the question whether upon the true construction of the testator's will and having regard to s. 31 of the Trustee Act, 1925, these accumulations went and accrued by way of addition to the shares of the defendants Robert Heap Turner and Doris Heap Lyons in the testator's residuary estate or formed part of the estate of Geoffrey Heap Turner, deceased.

If the latter alternative prevailed the defendant Jessie Turner took under the intestacy of Geoffrey Heap Turner, but he had died possessed of a large fortune which passed to her, and the rate of duty payable would, if she was entitled to the accumulations, be increased, and the duty payable would be increased by a sum much in excess of the accumulations. It

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was therefore to her interest to contend that the accumulations went to increase the shares of the defendants Robert Heap Turner and Doris Heap Lyons. For this reason the Attorney-General was made a party to the summons to argue in support of the contrary view.

BENNETT J. said it was plain upon the terms of clause 15 of the will that upon the testator's grandson Geoffrey Heap Turner dying before he attained the age of twenty-eight years the accumulations of income derived from his contingent share would have been added to the shares held in trust for his brother and sister.

But if s. 31, sub-s. 1 (ii.), applied, the accumulations which arose between the date of the death of the testator and the date of the death of Geoffrey Heap Turner formed part of his estate. It was impossible in his view to regard the word "shall" in cl. (ii.) of that sub-section as capable of being construed as "may" and it created therefore a trust. On this view s. 69, sub-s. 2, of the Act did not apply so as to admit the contrary intention shown by the testator's will, for that sub-section applied only to powers. Next it was argued that cl. (ii.) was a corollary to cl. (i.) and therefore that it did not apply to any instrument in which there was a maintenance clause that was sufficiently complete and comprehensive to amount to the expression of a contrary intention within s. 69, sub-s. 2. But there was no authority for so construing an Act of Parliament. Lastly, it was suggested that the contingent bequests to the two grandchildren who were still living were "prior interests" subject to which the provisions in s. 31, sub-s. 1, were made applicable. He could see no grounds for so holding. It followed that in his view the accumulations formed part of Geoffrey Heap Turner's estate.

The defendants R. H. Turner and Doris H. Lyons appealed, and the defendant Jessie Turner also appealed. The appeals were heard on June 30 and July 1 and judgment given on July 30, 1936.

Vaisey K.C. and *F. H. L. Errington* for the appellants R. H. Turner and D. H. Lyons. Clause 15 of the will is a

clearly drawn and consistent maintenance clause under which the accumulations clearly go to these appellants. It is said, however, that this provision is defeated by the Trustee Act, 1925, s. 31, sub-s. 1 (ii.), which is made peremptory by the use of the word "shall." Under the Conveyancing Act, 1881, and the Law of Property Act, 1922, the statutory provisions for maintenance, including that in s. 31, sub-s. 1 (ii.) of the Act of 1925, were made applicable only subject to any contrary intention expressed in the instrument creating the trust. Unfortunately the express provision to this effect in the earlier section was inserted in one omnibus provision in s. 69, sub-s. 2, of the Act of 1925, and it was made applicable only to "powers." It has been held therefore not to apply to the mandatory provision in s. 31, sub-s. 1 (ii.). It is to be noted, however, that express provisions as to application notwithstanding any contrary intention shown in the instrument creating the trust appear in ss. 14, 16, 26 and 27. It seems strange that s. 31 should contain an express mandatory provision against accumulation, although the matter is dealt with generally in s. 164 of the Law of Property Act, 1925, re-enacting the Thellusson Act.

[ROMER L.J. Might it not be said that the gift to the other two children of C. H. Turner which applied on G. H. Turner's death under twenty-eight years of age was a "prior interest" within the words "subject to any prior interests" in s. 31, sub-s. 1?]

That is our contention, and the point is one on which Clauson J. kept an open mind in *In re Spencer* (1), although Luxmoore J. in *In re Ricarde-Seaver's Will Trusts* (2) and Bennett J. in this case took a contrary view.

A difficulty in the way of this contention is, however, that "prior interest" presumably means an interest which during the period of Geoffrey H. Turner's contingent interest confers a paramount right to call for the income.

Even on the assumption that s. 31, sub-s. 1 (ii.), is imperative, it can have no application to a case such as the present, where cl. (i.) has never applied. The two provisions are united by

(1) [1935] Ch. 533.

(2) [1936] W. N. 146.

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the word "and" so that cl. (ii.) is ancillary to cl. (i.). Again, s. 31 is described in the marginal note as conferring a power of maintenance on trustees; and in any case a direction which is ancillary or a corollary to the clause conferring a power should be excluded from operation in a case where the power is never exercisable; and as such a corollary it comes within s. 69, sub-s. 2.

Cleveland Stevens K.C. and *C. R. R. Romer* for Mrs. Jessie Turner. The Trustee Act, 1925, is a consolidating statute, and s. 31, sub-s. 1 (ii.), should not be construed as having a peremptory meaning. For such a change in the law to be effected in a consolidating statute, the intention to vary the earlier provision must be expressed in clear terms: *In re Dickson*. (1) It is to be noted further that Part II. of the Act of 1925, which includes s. 31, is headed: "General Powers of Trustees and Personal Representatives." Further the contingent interest in question is not one carrying intermediate income to which alone s. 31 applies: see sub-s. 3 and compare *In re Spencer*. (2)

G. E. Timins for the District Bank, Ltd.

J. H. Stamp for the Attorney-General. "Powers" in s. 69, sub-s. 2, must be construed as having the ordinary meaning attributed to the word: see Farwell on Powers (3rd ed.), p. 10; and they are distinguished from trusts by the fact that they are never imperative. The fact is immaterial that in certain sections of the Act the draftsman has chosen not to rely on s. 69, sub-s. 2, but has put in an express provision applicable only to the particular section. Thus in s. 7, which beyond question confers a power, the express provision "unless expressly prohibited by the instrument creating the trust" has been inserted; and s. 14, which gives trustees power to give receipts, has a provision negating the application of s. 69, sub-s. 2.

[GREENE L.J. That section does more than confer a power.]

Sect. 27 gives power to distribute a trust estate after due notice, and again the operation of s. 69, sub-s. 2, is

(1) (1885) 29 Ch. D. 331, 336.

(2) [1935] Ch. 533.

expressly excluded. Thus there is throughout the Act a consistent recognition of the difference between a power and a trust : see also s. 33. Therefore in s. 69, sub-s. 2, the word "powers" must be construed in its ordinary sense, and as s. 31, sub-s. 1 (ii.), is imperative in terms, it creates a trust and not a power, and s. 69, sub-s. 2, has no application.

It must be admitted that on this view of the construction of the consolidating Act of 1925, a change has been made from the corresponding provisions in s. 88 of the Law of Property Act, 1922, where, although the imperative "shall" was used, sub-s. 6 expressly provided that the section was to apply only if and so far as a contrary intention was not expressed in the instrument under which the interest arose. But even so, there is no reason for not giving effect to the clear language of the consolidating Act.

Further, cl. (ii.) of s. 31, sub-s. 1, is in no sense ancillary to cl. (i.); it is a parallel provision. Lastly, there is no ground for treating the gift of the accumulation to Geoffrey Turner's brother and sister on his death under twenty-one years of age as a "prior interest." The "prior interests" in s. 31, sub-s. 1, refer to interests paramount and anterior to the contingent interest.

Cur. adv. vult.

July 30. LORD WRIGHT M.R. Romer L.J. will now read the judgment of the Court (Lord Wright M.R., Romer and Greene L.JJ.).

ROMER L.J. By s. 31, sub-s. 1, of the Trustee Act, 1925, it is enacted that where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then subject to any prior interests or charges affecting the property—(i.) during the infancy of any such person, if his interest so long continues, the trustees may pay or apply for his maintenance as therein mentioned the whole or such part of the income of the property as may be reasonable; and (ii.) if such person on attaining the age

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of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretions thereto under sub-s. 2 of this section to him, until he attains a vested interest therein or dies, or until failure of his interest. Sub-s. 2 provides that during the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income and hold the accumulations as therein mentioned. Sub-s. 3, so far as it is material to the present purpose, provides that the section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property.

The principal question arising upon this appeal is whether the provisions of cl. (ii.) of sub-s. 1, which in terms at any rate are directory, are to prevail in a case where a contrary intention is to be found in the instrument creating the trust. [His Lordship then stated the facts.]

In these circumstances the summons came on for hearing before Bennett J. on January 23, 1936. On behalf of the defendants other than the Attorney-General it was contended that cl. (ii.) of the sub-section in question was inapplicable for the following reason amongst others. Sect. 69, sub-s. 2, of the Act is in these terms: "The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust and have effect subject to the terms of that instrument." Here, it was said, was an express trust for accumulation of the income of the share of a grandchild after attaining the age of twenty-one and before attaining the age of twenty-eight, and that trust must by virtue of s. 69, sub-s. 2, prevail over the trust imposed by cl. (ii.) of sub-s. 1 of s. 31. To this the Attorney-General by his Counsel replied that s. 69, sub-s. 2, referred only to the "powers" conferred by the Act, and that the words of cl. (ii.) were imperative and created a trust and not a mere power.

This was the view that had been taken of the matter by

Clauson J. in *In re Spencer* (1) and Luxmoore J. in *In re Ricarde-Seaver's Will Trusts*. (2) In the former case Clauson J. said this: "If cl. (ii.) of s. 31, sub-s. 1, dealing with the income of a person who is between the age of twenty-one years and the age when he attained a vested interest in that which is given to him had been expressed in the form of conferring power on the trustees to maintain him out of the income, that clause would, prima facie, having regard to s. 69, sub-s. 2, of the Act, not have been available to override the express terms of the instrument creating the trust, in this case the will; but it seems pretty plain that that sub-section does not apply to this clause. Accordingly, it would seem that this clause in s. 31 has to be applied if the case falls within that section, so as to override anything inconsistent with the application of the clause which is to be found in the trust instrument." In the latter of the two cases Luxmoore J. said that s. 69, sub-s. 2, had no application to the case before him, because s. 31 did not confer a power on the trustees but imposed on them a statutory duty to pay the income notwithstanding the terms of the will.

In the present case Bennett J. followed the decision of Clauson J., stating that it entirely accorded with his own view of s. 31, the provisions in cl. (ii.), sub-s. 1, of which were trusts and not powers, and that the provisions of s. 69, sub-s. 2, were restricted to powers. From this decision two appeals are brought to this Court, the one by the defendants R. H. Turner and D. H. Lyons, the other by Jessie Turner. Both in the Court below and in this Court the appellants relied upon other grounds than the one based upon s. 69 of the Act. It is unnecessary, however, to allude to these grounds in detail, though a brief reference to them will be made later, as in our judgment the construction that the appellants seek to place upon s. 69, sub-s. 2, is the one that should prevail.

It has, of course, to be conceded that in terms the sub-section refers only to "powers," but it is necessary to ascertain precisely what it is that the Legislature intended by that word.

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For this purpose it is of importance to observe that the Trustee Act, 1925, is a Consolidation Act. It is intituled "An Act to consolidate certain enactments relating to trustees in England and Wales." It is therefore extremely unlikely, to say the least of it, that it effected any substantial change in the pre-existing law. It is indeed common knowledge that the Law of Property Act, 1922, which effected many radical changes in the law of property generally, including the law relating to trusts, was never intended to come into operation but to act merely as a foundation for the subsequent consolidation of the law that was carried into effect by the Trustee Act, 1925, and the other statutes of the same year that are compendiously referred to as the Birkenhead Acts. It is necessary, therefore, to examine the statute law relating to the matters dealt with in s. 31 of the Trustee Act, 1925, as it existed at the time that the Act was passed. By s. 43, sub-s. 1, of the Conveyancing Act, 1881, it had been enacted as follows: "Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely or contingently on his attaining the age of 21 years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not."

By sub-s. 2 the trustees were directed to accumulate the residue of the income and to hold the accumulations for the benefit of the person who should ultimately become entitled to the property from which the same arose. It is to be observed as regards this enactment that it did not apply where the infant's interest was less than a life interest or where vesting was postponed beyond the age of twenty-one years. The law in these respects was accordingly altered by the Law of Property Act, 1922, though, as already pointed out, the Act never came into operation and was never intended to do

so. Now s. 88, sub-s. 1, of that Act is for all practical purposes in precisely the same language as s. 31, sub-s. 1, of the Trustee Act, 1925. By cl. (i.) of the sub-section the trustees' power of maintenance of an infant was extended so as to apply (subject to any prior interests or charges) whatever might be the infant's interest in the property and whatever might be the contingency on which that interest was to take effect. Trustees would therefore have for the first time statutory power to maintain an infant out of the income of property given to him contingently on attaining the age of twenty-eight years. But a more striking alteration of the law was effected by cl. (ii.) of the sub-section. Under the Act of 1881 a trustee's power of maintenance ceased altogether when the person entitled attained his majority. The Act of 1922 for the first time provided for the maintenance of a person contingently entitled to an interest in property after that person had attained twenty-one and until his interest had become vested. The trustees were in terms directed to pay him the income in question just as they are in cl. (ii.) of s. 31, sub-s. 1, of the Trustee Act, 1925. But in s. 88 of the Act of 1922 there followed a sub-section which is of the utmost importance. It is sub-s. 6, and is in these terms: "This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, under which the interest arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained." It is plain, therefore, that when the Legislature in 1922 imposed upon trustees for the first time the duty of paying the income to the person contingently entitled from the time when he attains his majority to the time when his interest becomes vested, it did not intend to override any directions or expressions of intention to the contrary contained in the instrument under which such person's interest arises.

But the matter does not rest there. On December 18, 1924, there was passed the Law of Property (Amendment) Act, 1924. Its full title was "An Act to amend the Law of Property Act, 1922, and the enactments thereby affected, and

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to facilitate the consolidation of the law relating to conveyancing and property, settled land, trustees, the registration of pending actions, annuities, writs, orders, deeds of arrangement and land charges, the administration of estates, the registration of title to land and university and college estates." It was passed, as had been the Act of 1922, for the purpose, and in view, of the contemplated consolidation of the law that was in due course effected by the Birkenhead Acts less than four months later and was never intended to come into operation. For the present purpose the material section is the fifth, which was in these terms: "The amendments and provisions for facilitating the consolidation of the statute law relating to trustees contained in the Fifth Schedule to this Act shall have effect." The only amendment of s. 88 of the Act of 1922 to be found in this Fifth Schedule is one that for the present purpose is immaterial. Sub-s. 6 of the section was left untouched, and the intention of the Legislature as to the overriding effect of the instrument creating the trust was in 1924 the same as it had been in 1922.

In these circumstances was passed the Trustee Act, 1925, which, with the rest of the Birkenhead Acts, received the Royal Assent on April 9, 1925, and came into operation on January 1, 1926. This was the date on which it had been enacted that both the Law of Property Act, 1922, and the Amending Act of 1924 were to come into operation; but these Acts, with some small exceptions, were repealed by one or other of the Acts of 1925. In particular the Trustee Act, 1925, repealed s. 88 of the Act of 1922 and s. 5 and the Fifth Schedule of the Act of 1924. These two Acts had served their purpose, which was to make such amendments in the various branches of law dealt with in the 1925 Acts as the Legislature considered ought to be made with a view to its consolidation, and to permit of the Acts of 1925 being merely consolidating statutes. In these circumstances it is incredible that by the Trustee Act, 1925, the Legislature intended to change the law still further and in so radical a respect as to make the provisions of cl. (ii.) of s. 31, sub-s. 1, override the provisions of the instrument creating the trust. If it be

possible, therefore, s. 69, sub-s. 2, of the Act ought to be so construed as to make it consonant with s. 88, sub-s. 6, of the Act of 1922. In our opinion the sub-section is capable of being so construed. Part II. of the Act, in which s. 31 is to be found, is intitled "General Powers of Trustees and Personal Representatives." It is subdivided into "General Powers," ss. 12 to 25 inclusive; "Indemnities," ss. 26 to 30 inclusive; and finally "Maintenance, Advancement and Protective Trusts," which consists of ss. 31, 32, and 33. Sect. 31 deals with maintenance, s. 32 with advancement, and s. 33 with protective trusts. Now with the exception of s. 33, all the sections comprised in the first and last of these sub-headings either confer powers upon trustees expressly, or contain provisions ancillary to the exercise of trustees' powers, and correspond with what, when contained in settlements, would be comprehensively referred to by conveyancers as the Trustees' Powers. This being so, the provisions of s. 31 may properly be called comprehensively the statutory powers of maintenance just as those of s. 32 may properly be called comprehensively the statutory powers of advancement. The fact that s. 31 contains provisions that are directory is immaterial. Powers of maintenance, in the comprehensive meaning of that term, usually do. Nothing is more common, for instance, than a direction to trustees to accumulate during the minority income not applied in maintenance. Such a direction is merely ancillary to the power of maintenance strictly so called, and may well be regarded as a part of the power of maintenance in its comprehensive sense. Such a direction is indeed contained in sub-s. 2 of s. 31 of the Trustee Act, 1925, and is an essential part of the statutory power of maintenance conferred upon trustees by the section. In the same way the direction contained in cl. (ii.) of sub-s. 1 can be regarded as being merely an essential part of the new statutory power. This statutory power of maintenance, that is to say, the totality of the provisions to be found in s. 31 of the Act, is, in our opinion, one of the "powers conferred by this Act," within the meaning of s. 69, sub-s. 2, and therefore only applies if and so far as a contrary intention

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is not expressed in the instrument creating the trust and has effect subject to the terms of that instrument. For these reasons we are of opinion that the accumulations of the income of the presumptive share of Geoffrey Heap Turner made by the trustees did not form part of his estate, but accrued by way of addition to the shares of the defendants Robert Heap Turner and Doris Heap Lyons in the residuary estate of the testator.

It only remains to mention briefly the other contentions advanced on behalf of the appellants. It was said that the provisions of cl. (ii.) of sub-s. 1 of s. 31 of the Act only take effect in cases where the provisions of cl. (i.) have become operative, that is to say, where, at the date of the instrument taking effect, the person in question is under twenty-one years. This contention is, in our opinion, inconsistent with the plain words of the section and is untenable.

The other contention was that the trust in favour of Geoffrey Heap Turner did not carry the intermediate income within the meaning of sub-s. 3 of the section. It is sufficient in the circumstances to say that in our opinion this contention is also untenable.

Another contention, advanced on behalf of the appellant Jessie Turner, was that the interest of the persons who should ultimately become entitled to the residuary estate in the accumulations of income directed by the will was a prior interest affecting the property within the meaning of s. 31, sub-s. 1. The question involved in this contention was adverted to but left undetermined by Clauson J. in *In re Spencer*. (1) It is a question of some difficulty upon which we need not express an opinion. For in view of the construction that we have put upon s. 69, sub-s. 2, of the Act, the question can never arise again, inasmuch as the direction to accumulate is in any case an expression of a contrary intention within the meaning of that sub-section.

In the result both the appeals succeed and a declaration must be made as asked by the notices of appeal. The costs

of all parties to the appeals will be taxed as between solicitor and client and paid out of the accumulations.

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Solicitors: *Winter & Co., for Jackson & Co., Rochdale;*
Solicitor of Inland Revenue.

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Will—Annuities charged on corpus—Direction to accumulate surplus income of residue—Gift of capital and accumulations to children of testator—Death of testator without issue—Partial intestacy—Accumulation not to be continued—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 49.

A testator, after bequeathing an annuity to his mother, directed his trustees out of the annual income of his residuary estate to pay an annuity to his wife, and he further directed that the surplus income of his residuary trust fund should be accumulated during the life of his wife or for twenty-one years from his death (whichever period was the shorter); and he directed that at the expiration of the period of accumulation his residuary trust fund should be held upon trust, as to both capital and income and the accumulations of such income, for his children.

The testator died without issue, and his widow claimed that she was entitled to call on the trustees to stop the accumulation of any surplus income of the residuary estate and deal with any such surplus income as upon an intestacy. The testator's mother claimed that the accumulations ought to be continued:—

Held, that the testator having died without issue there was no effective disposal by his will within the meaning of s. 49 of the Administration of Estates Act, 1925, of the residuary estate, and that the direction to accumulate the income was not a direction to which the property not effectively disposed of by the will was subject.

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Held, therefore, that, subject to making provision in due course of administration for the annuity given to the testator's mother, the trustees ought not to accumulate the surplus income, but that it ought to be dealt with as income from the residuary estate undisposed of by the testator.

In re Sullivan [1930] 1 Ch. 84 approved.

Decision of Bennett J. [1936] Ch. 570, affirmed.

APPEAL from a decision of Bennett J. (1)

By his will dated March 9, 1933, the testator, Ralph Thornber, who died on June 26, 1933, bequeathed to his mother, Lettice Thornber, an annuity of 52*l.* to be paid free of duty and income tax, and after a specific bequest and a specific devise to his wife, Agnes Thornber, the testator by clause 8 devised and bequeathed all the residue of his real and personal estate on trust for sale and conversion and he directed his trustees out of the money arising from such sale and conversion to pay his debts, funeral and testamentary expenses and any legacy or annuity and the duties payable on any legacy or annuity bequeathed free of duty and subject thereto the trustees were to stand possessed of the residuary trust fund on the following trusts: "(a) to pay out of the annual income thereof the sum of 10*l.* per week to my said wife during her life provided always that in the event of my residuary trust fund being insufficient to pay to my said wife the said sum of 10*l.* per week my trustees shall have power to resort to the capital of my residuary trust fund to make up any such deficiency; (b) Subject thereto my trustees shall invest and accumulate the income of my residuary trust fund at compound interest by investing the same and the resulting income thereof as an accretion to the capital of my residuary trust fund during the life of my wife or for a period of twenty-one years from the date of my death (whichever period is the shorter) and at the expiration of such twenty-one years or at the death of my wife whichever shall first happen (hereinafter called the date of distribution) upon trust as to both capital and income and the accumulations of such income" for the children of the testator as thereafter set forth.

The testator never had any children, and there were consequently no persons for whose benefit under the terms of the will accumulation could be made.

The question asked by the summons, which was taken out by the trustees of the will, was whether in the events which had happened the plaintiffs ought during the life of the testator's widow or for twenty-one years from the death of the testator, whichever period should be the shorter, to accumulate any surplus income of the residuary estate or whether such accumulations should cease and the surplus income be dealt with as income from the residuary estate undisposed of by the testator.

The question turned on the construction of s. 49 of the Administration of Estates Act, 1925, which provides: "Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will."

Bennett J. held that, subject to making provision in due course of administration for the annuity given to the testator's mother, the trustees ought not to accumulate the surplus income, but that it ought to be dealt with as income from the residuary estate undisposed of by the testator.

The testator's mother appealed. The appeal was heard on July 27, 1936.

Sir Gerald Hurst K.C. and *Gerald Upjohn* for the appellant repeated in substance the arguments used by them in the Court below.

W. C. Cleveland-Stevens K.C. and *C. E. R. Abbott* for the testator's widow were not called upon.

Roger Turnbull for the trustees of the will.

LORD WRIGHT M.R. This case raises a short point upon the construction of a will. The testator made his will in 1933 and died shortly afterwards, leaving no issue. That is the essential fact in regard to the matters which we have to consider here. Under his will the material provisions to be considered are these. [His Lordship read the material

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provisions of the will and continued :] The testator never had any children, and therefore as to the residuary trust fund dealt with in clause 8 (b) there was an intestacy, to which s. 49 of the Administration of Estates Act, 1925, applies. The material words of that section are these: "Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will." The section which applies here, that is to say, the section which determines what is to happen in the event of an intestacy, is s. 46, of which I need only read the first part. It provides: "The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely:—(i.) If the intestate leaves a . . . wife (with or without issue) the surviving . . . wife shall take the personal chattels absolutely"—in this case they were dealt with by the will—"and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of one thousand pounds, free of death duties and costs, to the surviving . . . wife with interest thereon from the date of the death at the rate of five pounds per cent. per annum until paid or appropriated, and subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held—(a) If the intestate leaves no issue, upon trust for the surviving . . . wife during . . . her life." Clause (b) of the section has no application to this case.

That being the position, the question has been raised whether the widow is entitled to claim that she has a beneficial life interest in the residuary estate and, if so, whether she is entitled to claim the benefit of the income therefrom as being entitled thereto in full right. The trustees have taken these proceedings in order to obtain the direction of the Court whether that is so or whether or not they are bound to accumulate the income as an accretion to capital in the terms of clause 8 (b) of the will. The learned judge has held that they are not so bound.

It has been contended that the trustees are still bound to go on investing and accumulating the income of the residuary trust fund as an accretion to capital under clause 8 (b). The argument was put on the words which are to be found in s. 49 of the Act, "subject to the provisions contained in the will." It was said that though it was clear there was no disposition which was effective in regard to this residuary trust fund, so far as the fund was to be accumulated on trust for the children (there never were any children), still there were certain provisions of the will which dealt with this trust fund which must be fulfilled, even though the trust had entirely failed and the disposition contained in the will had entirely failed, and although there was an intestacy as to this residuary trust fund within s. 49. The learned judge has rejected that contention, and I agree with him. In my judgment, there is here no provision contained in the will to which the property, which, in fact, was not effectively disposed of by the will, is subject. In my opinion, the provision in question cannot be dissected and it cannot be said that there is a clear and effective provision as to investing and accumulating the income as an accretion to capital when the purpose or object to which that investment or accretion is directed in the will has entirely failed and when there is no effective disposition at all. In my judgment, the whole of this provision 8 (b) is a single provision governed by the purpose, namely, the trust which is specified, and, that having failed, there is, I think, no provision within the meaning of s. 49 of the Act at all.

That I understand to be the decision of Maugham J. in *In re Sullivan* (1), a case which, in my opinion, involves the same principle as this case. Indeed, Mr. Upjohn has quite frankly admitted that the argument for the appellant here involves the contention that the decision of Maugham J. was wrong. The case there was this: a testator had disposed of the whole of his residuary personalty, including royalties in respect of copyrights, to his trustees upon trust to pay the income to his wife for life and after her death in trust for his

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children or remoter issue. He died without having had children, and the question arose whether, if the widow disclaimed her life interest under the will, royalties received by the trustees in respect of copyright or other interests comprised in the estate would be income or capital. It was held that the widow, upon disclaiming, would become entitled to a life interest in the residue and would take the royalties as income; that is to say, upon disclaiming her right under the will to be paid the income, she would then be entitled to claim as being entitled to a life interest in the residue and she would, therefore, be entitled to claim the royalties as they fell in year by year as part of the income of that life interest to which she was beneficially entitled in the events that had happened and under s. 46, which I have read. Maugham J. puts the matter in this way (1): "The only question is whether the disclaimer will render inoperative for all purposes that part of the will which it affects. In the present case the provision as to royalties was inserted in the will in order to diminish the widow's life interest for the benefit of children who, in the event, do not exist. It was clearly not inserted in order to determine the nature of interests to be taken in property in respect of which he died or might die intestate." Then Maugham J. deals with the argument based on the words of s. 49 and says: "It is true that s. 49 of the Administration of Estates Act, 1925, might be construed to mean that the provisions of that part of the Act shall have effect subject to the whole of the provisions in the will, including any provisions which become inoperative by virtue of disclaimer, lapse, or other event. I am satisfied that that is not the true construction of the section. The phrase 'subject to the provisions contained in the will' is intended to show that the provisions of the Act relating to property not disposed of by will must take effect subject to all the provisions of the will which remain operative and effective. In my view, therefore, the widow, upon executing a disclaimer, will be entitled to a life interest in the residue of the testator's estate, including royalties receivable by the trustees." That statement applies

here exactly, subject to the question of disclaimer. If the widow here disclaims her right to the annuity of 10*l.* a week then there would be no distinction at all, but, in my opinion, that is a matter which is not important to the ultimate decision. The residue is, in any event, subject to the payment of the annuity to the mother of the testator and the trustees are bound to make provision for that as a first charge, and in the same way the residue would be subject to the right of the widow to have her weekly payment of 10*l.* provided for. If, however, she disclaims that right then she will be entitled without any further qualification, except for the provision for the mother of the testator, to have the income of the residue. In my judgment, clause 8 (b) of the will has become ineffective and cannot be regarded as being a "provision contained in the will," to which the widow's rights on an intestacy are subject. *In re McKee* (1), which was referred to, involves an entirely different question.

I think the judgment of the learned judge was right and should be affirmed.

ROMER L.J. I agree. The first thing to be ascertained is what interest in the testator's estate remains undisposed of by his will. When we have ascertained that, then, by virtue of s. 49 of the Administration of Estates Act, 1925, that interest will be held upon the trusts that are set out in s. 46 of the Act. Sect. 49 obviously applies to a case where the testator has failed to dispose of some particular item of his property; but it is plain, and it was so held in *In re McKee* (1), that it also applies to a case where the testator has disposed of the whole of his property but has failed to make effective disposition of every interest in that property so that as regards that interest it passes as on an intestacy. It was incidentally held in *In re McKee* (1), too, that in such a case the trust for sale imposed by s. 33 in Part III. of the Act had no application to the interest so disposed of, which merely had to be held on the trusts set out in Part IV. of the Act, and, therefore, in a case like the one with which the

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C. A. Court was dealing there, s. 49 had precisely the same effect
1936 as though the interest had been disposed of by the will in
THORNBER, manner set out in s. 46 of the Act. It is not true to say that
In re. that is the result of s. 49 in all cases.

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THORNBER. Now, as I have said, the first thing to be ascertained is
what interest in the testator's property has been undisposed
of by his will. I will not read the will again; it has been
already read by the Master of the Rolls. It is sufficiently
plain that, subject to the annuity to the mother and, of
course, other legacies and so forth, and subject to the annuity
to the widow, the testator's residuary estate is undisposed
of and that the accumulation directed by the will is an
accumulation directed solely for the purposes of his ultimate
residuary gift to his children and fails with that gift. Sir
Gerald Hurst in the course of his argument agreed when
I asked him whether before the Act the next of kin could
not have insisted upon receiving the surplus income from
year to year after the two annuities had been disposed of,
and, of course, he had to agree that that was the case; the
next of kin would have been entitled to claim that income
as being income undisposed of by the will. It follows that
under s. 49 the income in the corpus of the estate will now
be held upon the trusts set out in s. 46 and that the trust
for accumulation has no application whatsoever. Sir Gerald
Hurst and Mr. Upjohn both very strongly relied upon the
words to be found in s. 49 of the Act, "subject to the pro-
visions contained in the will," and they said that this direction
to accumulate was one of the provisions contained in the
will to which effect must be given having regard to those
words in s. 49. I agree again, but when you have ascertained
what interest has been undisposed of by the testator you then
look at the will to see whether as regards that interest he
has given any directions, and, if he has, those directions
must be attended to. For instance, it is conceivable that a
testator bearing in mind the provisions of the Administration
of Estates Act, 1925, might insert a direction something to
this effect in his will: "In the event of any of my property
being undisposed of by this my will and the provisions of

s. 49 taking effect I direct that any such property shall be dealt with " in a particular way ; but the provisions in this testator's will relating to accumulation are not provisions relating to any interest of which the testator had failed to dispose.

In my opinion, the decision of Bennett J. was right.

GREENE L.J. I agree.

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Appeal dismissed.

Solicitors : *Williamson, Hill & Co., for Clarkson, Thomas & Collinson, Halifax ; Robbins, Olivey & Lake, for Longbothams & Bradley, Hebden Bridge.*

W. I. C.

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Landlord and Tenant—Lease of self-contained shop—Covenant not to make alterations without lessors' consent—Proposed alterations—Extension to adjoining premises—"Improvements"—"Damage to or diminution in value of premises"—Consent refused—Whether unreasonable refusal—Onus of proof—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5, c. 36), s. 19, sub-s. 2.

The Landlord and Tenant Act, 1927, s. 19, sub-s. 2, provides :
" In all leases whether made before or after the commencement of this Act containing a covenant, condition, or agreement against the making of improvements without licence or consent, such covenant, condition, or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to

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the landlord and of any legal or other expenses properly incurred in connexion with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed."

The plaintiffs held a lease of a shop at 18 and 20 Commercial Road, Bournemouth, from the defendants for an unexpired term of forty-two years at a rent of 3500*l.* a year rising after 1945 to 3750*l.* a year. The lease contained a covenant by the plaintiffs not without the previous consent in writing of the lessors to erect or suffer to be erected or made on the demised premises any structural alterations or additions, and provided that if with such consent such structural alterations or additions were made no fine or increase of rent should be demanded for the lessors' approval.

The plaintiffs proposed to enlarge the shop by pulling down the wall at the back and connecting it with other adjoining land of which they held a lease from another lessor, and by erecting over the whole combined property one large shop, in which the main staircase, staff accommodation, etc., would be removed from the demised premises to the extension. The defendants refused their consent to the proposed alterations except on the payment by the plaintiffs to them of 7000*l.* in respect of damage to or diminution in the value of the demised premises. The plaintiffs offered to reinstate the demised premises in their former condition before the determination of the term, and to take out a policy of insurance to secure the performance of this obligation, but they refused to pay the 7000*l.* The plaintiffs therefore commenced this action, asking for declarations that the defendants were not entitled to withhold their consent to the proposed alterations, and that if they did so the plaintiffs were to be at liberty to proceed with the alterations without such consent:—

Held, by a majority (Greene L.J. dissenting) that the proposed alterations were "improvements" within the meaning of s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927.

Decision of Clauson J. [1936] Ch. 415 reversed on this point.

But *held* by the whole Court, dismissing the appeal, that the plaintiffs had failed to discharge the onus which lay on them of proving that the defendants had unreasonably withheld their consent to the proposed alterations.

Decision of Clauson J. affirmed on this point.

APPEAL from the judgment of Clauson J. dated March 2, 1936.

The plaintiffs, F. W. Woolworth & Co., Ltd., were the lessees and the defendants Mr. Garnet Ewart Lambert and

Mr. William Robert Joel Lambert were the lessors of a shop know as Nos. 18 and 20 Commercial Road, Bournemouth. The lease was dated February 27, 1931, for a term of forty-two years at a rent of 3500*l.* a year, to be increased to 3750*l.* as from June 24, 1945, and contained the following covenant by the plaintiffs, lessees, "not without the previous consent of the lessors to erect or suffer to be erected any other building upon the said demised premises nor to make or suffer to be made any structural alterations in or additions to the demised premises" with a proviso "that in the event of the lessees making with the consent and approval of the lessors any further additions, alterations," etc., "of the demised premises at any time during the said term no fine or premium or increase of rent will be demanded for such consent and approval."

The demised premises had been two self-contained shops but at the date of the lease had been converted into one shop, and the lessees covenanted under the lease "to use occupy and preserve the demised premises open as a first-class shop suited to the neighbourhood."

The plaintiffs, Messrs. F. W. Woolworth & Co., Ltd., acquired on lease from another owner a piece of land at the back of the demised premises and asked for the consent of the defendants to the making of alterations to utilize this new acquisition. These alterations entailed the removal of the back wall and the removal of all the staircases and lavatory accommodation, the latter to be removed to the newly acquired piece of land. The defendants took expert advice and were advised that the damage and diminution to the reversion was equivalent to at least 7000*l.* or two years' rent. They accordingly demanded this sum. The plaintiffs considered this unreasonable, but offered to reinstate the premises at the end of the term and to guarantee the same by a policy of insurance. This counter-offer was refused. The plaintiffs thereupon commenced the present action alleging that the defendants had unreasonably withheld their consent and asking for declarations (1.) that the defendants were not entitled by reason of the Landlord and Tenant Act, 1927, to

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withhold their licence or consent to the making of the improvements, and (2.) that the plaintiffs were entitled to make the said improvements without any further request for licence or consent on the part of the defendants but subject to the plaintiffs (inter alia) paying to the defendants such sum as the Court should deem to be reasonable. Clauson J. held that though the covenant should be regarded from the point of view of the lessee rather than from that of the lessor (*Balls Brothers, Ltd. v. Sinclair* (1)), the alterations now proposed were not improvements to the demised premises, though they might be for the benefit of the plaintiffs as tenants of the demised premises and the adjoining property, and therefore did not come under s. 19, sub-s. 2, of the Act. He also held that there was no evidence before him on which he could hold that consent had been unreasonably refused.

The plaintiffs appealed. The appeal was heard on July 27, 28, 29, 1936.

Sir William Jowitt K.C., Fergus Morton K.C., and S. P. J. Merlin for the appellants. The Landlord and Tenant Act, 1927, s. 19, sub-s. 2, is to assist an enterprising tenant to make improvements and at the same time safeguard the landlord in respect of any diminution in the value of the reversion. If the alterations are for the purpose of facilitating the carrying on of the plaintiffs' business, they are improvements within the meaning of the sub-section. In that case the landlord cannot unreasonably withhold his consent, and if he demands a sum by way of compensation which the tenant considers unreasonable, it is for the Court to determine what is a reasonable sum, and if the Court finds that the proposed alterations are improvements, then to give the relief asked for.

Cyril Radcliffe K.C. and Roger Turnbull for the respondents. The learned judge held that the proposed alterations were not improvements to the demised premises and therefore did not come within s. 19, sub-s. 2, and if this be so then the question whether 7000*l.* was a reasonable sum or not to demand for damage to or diminution in the value of the

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reversion did not really arise. The mere fact that the landlords asked a sum mentioned by their advisors did not make the refusal unreasonable.

[GREENE L.J. It may be that the landlord's demand is unreasonable, but his refusal to give consent to the alterations may be reasonable?]

Cyril Radcliffe K.C. Yes.

Fergus Morton K.C. in reply. What we are doing is an improvement within the sub-section. There has been no breach of any of the covenants in the lease if we improve the premises in the manner we propose. The learned judge said the plaintiffs had *not* shown that nothing was a reasonable sum and that as they had not offered a sum which they could prove to be reasonable, they failed. He ought to have decided the question of fact—namely, was 7000*l.* a reasonable sum for any diminution of value? This Court has jurisdiction to refer to an expert under s. 88 of the Judicature Act, 1925.

LORD WRIGHT M.R. This is a very important case, to my mind, because a result of these proceedings, whatever else they may produce, has been to leave the vital question in the air. The plaintiffs here, as I understand the position under the Act, to which I shall refer in a moment, have to establish that the defendants, as landlords, have unreasonably refused to grant a licence or consent to certain alterations or improvements on the demised premises, which the plaintiffs, as lessees, were desirous of making.

In order to determine that issue, it was necessary to determine whether a particular sum which the landlords claimed, was or was not a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlords. The sum which was the subject of dispute up to the date of these proceedings was 7000*l.*, and the learned judge, who has dealt with various other matters, to some of which I shall have to refer, has come to the conclusion that the evidence does not enable him to say that 7000*l.* was either reasonable or unreasonable, and on that footing, and on the view that the

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onus to prove that the licence has been unreasonably refused lay on the plaintiffs, he has dismissed the action.

Much as I regret this abortive conclusion, it seems to me that it must stand here. I feel that the matters at issue in these proceedings cannot be determined without a definite ascertainment of the reasonable sum, or rather, whether the sum of 7000*l.* was a reasonable sum within the meaning of sub-s. 2 of s. 19 of the Act ; and although the Court has a discretion, in proper cases, of referring any issue of fact to a special referee or to an official referee, I do not think, in all the circumstances of this case, that this is a case where the Court ought to take that course. The parties must now be left to take whatever further steps they may think proper, and no doubt the plaintiffs may be minded to take other steps, by proceedings at law or otherwise. But so far as this action is concerned I have come to the conclusion, very reluctantly and with very much regret, that on the short ground which I have stated the appeal should be dismissed.

I do not think it desirable to leave the matter with that bald statement. The learned judge has laid down some principles as to the construction of the statute which appear to me not only to be of important and far-reaching consequence, but, if I may say so with the greatest respect, both to him and to any one else who may take another view, to be unfounded and not in accordance with the true construction of the statute. I think it my duty, having expressed the opinion that I have, to say that, and not to leave the decision on the simple and unsatisfactory ground which I have already put.

The section in question has been already read. It is s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927. That Act, as is well known, was intended to extend, in certain respects, the rights of lessees, and in particular to increase their power of making a beneficial use of property of which they were lessees, notwithstanding the obstruction or demands of their lessors as landlords.

The sub-section in question, with that object in view—and I do not refer to this object as determining in any way the construction of the sub-section : that must depend on

the actual language used—the sub-section in effect provides that where there is a covenant against the making of improvements without licence or consent, that covenant, whatever the terms of the lease may be, is to be deemed subject to a proviso or term that the licence or consent is not to be unreasonably withheld. So far that is for the benefit of the lessee. The sub-section, however, proceeds to lay down certain rights in favour of the landlord, so that his position may not be unduly prejudiced. He is not to be entitled, it is true, to bar the development of the premises in a proper way by means of improvements by the lessee, but he is to be protected by being given the right of requiring, as a condition of his licence or consent, the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and various other matters. Furthermore, the landlord is given a right, in cases of an improvement which does not add to the letting value of the building, to require as a condition of such licence or consent, where that requirement is reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed. I said it gave him a right in that latter event; the exact language is that it does not preclude the right; I do not know whether that difference may be material in certain events.

I only need to refer to one other part of s. 19; that is the paragraph appended to s. 19, sub-s. 3, which provides that: “Where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the landlord shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.” There is no corresponding clause appended to sub-s. 2; the clause I have read can only apply to sub-s. 3 because of the final words: “the landlord shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.” In the case of sub-s. 2 it is perfectly clear that there are many other conditions which are to be determined besides the mere amount of the reasonable sum in

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C. A. question. It is the absence, I think, of any such paragraph
 1936 in reference to sub-s. 2 which has led to many of the arguments
 F. W. and much of the difficulty in this case.
 WOOLWORTH & Co. Now as to the facts. They are, from one point of view,
 v. rather complicated, but I shall state them as broadly and as
 LAMBERT. simply as I can. First of all I must refer to the lease in
 Lord Wright respect of which this question arises. It is dated February 27,
 M.R. 1931, between the defendants the lessors, and the plaintiffs
 the lessees. It is a demise of a piece of land situate in
 Commercial Road, Bournemouth, together with the buildings,
 shops and premises erected thereon and known as No. 18
 Commercial Road and No. 20 Commercial Road, Bourne-
 mouth. They had been separate premises, but Messrs.
 Woolworth had acquired them both and turned them into
 one shop, in a manner which is very common and perfectly
 well known of turning two premises into one. The lease is
 for a period of forty-two years at a rent of 3500*l.* rising to
 3750*l.* There are covenants on the part of the lessee, and I
 must refer to certain of them. Para. 2, sub-para. (iv.),
 of these covenants is a repairing covenant, the language of
 which is not unimportant: "From time to time to well and
 substantially repair, cleanse, maintain, amend and keep the
 demised premises and all new buildings, structures and
 erections which may at any time during the said term be
 erected on and all additions which may be made to the
 demised premises and the landlords' fixtures thereon and the
 appurtenances thereof."

Sub-para. (v.) is a covenant by the lessee "Not without
 the previous consent in writing of the Lessors to erect or
 suffer to be erected, any other building upon the said demised
 premises nor to make or suffer to be made any structural
 alterations in or additions to the demised premises." That
 word "nor," I think, is miswritten for "or," and I think the
 second paragraph, as much as the first, is governed by the
 words "without the previous consent in writing of the
 Lessors"; that is the covenant which I shall have to deal with
 a little later, when I come to the application of the sub-
 section. The rest of this clause I do not intend to read.

I need only refer to two other clauses in the lease. One is sub-clause (xi.): "Not to carry on or suffer to be carried on in or upon or about the demised premises or any part thereof any noxious or offensive trade business or calling whatsoever but to use occupy and preserve the demised premises as a first-class shop suited to the neighbourhood and such as shall be in no way detrimental to such neighbourhood as being unsightly offensive or noisy and at all times of the year during the usual business hours of the locality to keep the demised premises open as a first-class shop or shops and to use the best endeavours of the Lessee Company to develop extend and improve the said business and not to do or suffer to be done anything to injure the connection or goodwill" and so forth.

Then there is sub-para. (xii.). The lessees covenant "Not to do or permit anything in or upon the demised premises or any part thereof which may be or become a nuisance annoyance disturbance or damage to the lessors or their tenants or occupiers of other property or the neighbourhood nor to commit or suffer to be committed any waste spoil or destruction on the demised premises or any part thereof and not apply for an excise licence or use the demised premises for the sale of malt or spirituous liquors."

The lessees having entered into possession of these premises—or rather, they had been in possession before the lease—desired to make certain alterations because their business was extending, and they wished to make the best use of the demised premises for the purposes of their business. What they sought to do was this. They sought to remove the back wall of those premises and to build at the back of the premises a further building, a part of which would be on an unused vacant piece of land which was a portion of the demised premises, and part of which would be on other land belonging, at that time, to a Commander Monro whose land was apparently vacant, but the plaintiffs had obtained a lease of it and within the limits of that lease were proposing to build these new premises which would have been a continuation or extension of the original shop.

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C. A. There is also a further minor alteration which they
 1936 contemplated. That was the taking in of a strip of land from
 F. W. premises on the side of the demised premises in order to cut
 WOOLWORTH off and straighten out a small angle and thereby make the
 & Co. use of the demised premises more advantageous, because the
 v. demised premises were the front part of the shop, the part to
 LAMBERT. which the public would naturally resort, and it was desired
 Lord Wright to make them as convenient as possible.
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Then, if the new premises were built at the back, the existing staircase which had been at the back of the original shop would have to be moved back, or would conveniently be moved back ; and in addition the plaintiffs desired to remove the lavatory accommodation and the stairs and the heating and ventilation appliances to the proposed new part of their establishment, again leaving the front of the shop more advantageously employed for the purposes of the public trade. I think that is sufficient to indicate the general nature of these proposals.

Certain correspondence took place between the parties, and the result was a letter of May 13, 1935, from the defendants' solicitors to the plaintiffs' solicitors, which was in these terms: "Dear Sirs, We have now fully considered your request for a Licence to allow certain alterations to 18 and 20 Commercial Road, Bournemouth. Our clients take the view that the work which you desire to carry out would diminish the value to them of the premises and they are not willing to grant a licence except on the footing of (a) The payment of 7000*l.* and the costs of the licence and (b) the execution by your clients in a form approved by our clients of a covenant to reinstate the premises at the expiration or sooner determination of the term."

That letter was clearly dealing with the two rights which were secured to the landlord as a condition of his granting a licence or consent, because there was no question between the parties that there should be a covenant to reinstate. I do not know whether all the terms were definitely agreed, but, anyhow, it is not suggested that there is any real difficulty about agreeing on that. The bone of contention

was the 7000*l.* The plaintiffs took the view that, having regard to the rent they were paying and to the nature of the alterations, there was no need to pay anything at all; but they did not adhere to that view, because, in answer to that letter which I have just read they pointed out that they considered the sum of 7000*l.* was an inordinate sum. They add: "We can only surmise that your clients are demanding such a sum as a fresh basis for negotiation, and we are instructed therefore to make you the following counter proposal." The counter proposal made was: "That in return for a licence to carry out the said work they should pay the lessors a reasonable sum in respect of any damage to or diminution in the value of the premises (if any) such sum to be ascertained by the Court if not agreed." That proposal was rejected and thereupon this writ was issued.

The form of the action needs to be observed. The issue is put in para. 6 of the statement of claim in this way: "By letter dated the 13th May 1935"—that is the letter I have read—"the defendants refused their consent to the making of the said improvements except on the footing (inter alia) of the payment by the plaintiffs to the defendants of the sum of 7000*l.*"

The plaintiffs then ask for a declaration to the effect that they "are entitled to make the said improvements without any further request for licence or consent on the part of the defendants but subject to the plaintiffs:—(a) Undertaking to reinstate the demised premises at the end or sooner determination of the said term in the condition in which they now are, (b) Securing the performance of the said Undertaking by a policy of insurance in an office of repute or in such other manner as this honourable Court may deem satisfactory, (c) Paying to the defendants such sum (if any) as this honourable Court shall deem to be reasonable in respect of the damage (if any) to the demised premises or the diminution in value (if any) of the demised premises to be caused by the carrying out of the said improvements under the conditions (a) and (b) mentioned above."

Now as to that claim for a declaration, I must point out

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at once that, in my opinion, it is irregular and not such as the Court ought to entertain. The question at issue was whether, in all the facts of the case, the defendants had unreasonably withheld their licence or consent, and though it may be, and I think it was, the fact, apart from questions which were raised in the course of the trial, that the real issue was whether 7000*l.* was or was not a reasonable sum, that was subordinate to the decision of the matter essentially in question—namely, whether there was an unreasonable refusal of the licence.

The matter went to trial and evidence was given by experts, two on each side, on the question of whether 7000*l.* was or was not a reasonable sum for the defendants to exact as a condition of their consent. The experts for the plaintiffs' thought that there was no diminution in value at all and therefore no sum ought to be exacted. On the other hand, the two experts called for the defendants said that 7000*l.* was the proper sum, or a still larger sum. But there was no specific or detailed evidence except that of those two gentlemen on each side who gave their views. There was, to my mind—and I have read the evidence carefully—no adequate material on which any conclusion could be arrived at as to what was a reasonable sum, or whether 7000*l.* was or was not a reasonable sum, and, as I have said, on that ground the appeal must fail.

The learned judge really dismissed the appeal on other grounds, but grounds of principle on which I must say a few words. He expressed the view, in the first instance, that the Act did not apply at all, because what was proposed could not be regarded as in law improvements within the meaning of the sub-section. Of course, if that was right, the matter would be at an end; but in my view, with the greatest respect, I construe the word "improvement" differently.

There are two questions to be considered in a matter of this sort: first, whether the proposed alterations or improvements are of such a character as not in law to be capable of coming within the provisions of the Act; secondly, if that matter of law is answered in favour of the plaintiffs, whether the proposed alterations are in fact within the meaning of

the Act. Now the word "improvements" is here used not as importing that the covenant, condition or agreement referred to must contain those words, because they would not, I imagine, generally be used. The sub-section refers to any covenant against alterations without licence or consent. If you have such a clause, in whatever terms, and the proposed alterations are in fact capable of being deemed to be improvements, then the section would apply.

It is said here that the word "improvement" means an improvement first of all from the point of view of the landlord. I think the learned judge was not disposed to accept that; on the contrary he construed the word "improvements" as meaning improvements from the point of view of the tenant. I think he was right in that, and he followed a decision of Luxmoore J. in *Balls Brothers, Ltd. v. Sinclair* (1) and an earlier decision of Rowlatt J. I agree completely with that decision and the reasons given, and I say no more about it.

Then it was said these cannot be improvements within the meaning of the section because even regarding the matter from the point of view of the tenants they must be improvements of the demised property specifically, and in this particular case the proposed alterations were not such improvements, and so far from increasing the value of the demised property regarded separately and in itself, they had just the opposite effect. There was some picturesque language used about it. They were improvements which had the effect of removing a necessary part of the shop, regarded as an isolated shop, such as the main staircase, the heating and lavatory arrangements, and in particular the back wall. It was said the effect would be to destroy the premises as a shop altogether, and that therefore they could not in law be treated as improvements. I do not take that view. I think the word "improvements" is used here in a wider sense. The question, being regarded from the point of view of the tenant, is: How can he get, consistently with the other conditions of his lease, the most beneficial user of these premises as premises? One way of achieving that result may be to use these premises along with and in

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conjunction with some other premises, and to achieve that result some structural alterations may be, and probably always will be, necessary. Take the case where it is desired to include an adjoining shop, as was done in the case of Nos. 18 and 20 Commercial Road originally, or take the case where, in order to make the best use of a shop opening out in the street, it is desirable to remove to another position ancillary conveniences and apparatus. For instance, it might be desirable to shift the heating and other apparatus and lavatories to adjoining premises, making any necessary openings for that purpose, and it might be desirable for that purpose to take out of the shop those things which are provided for in other quarters. In all these cases the shop would cease to be a self-contained shop, and in a sense some part of it would be dismantled, and there would be structural alterations ; but the result would be that from the point of view of the tenant he would be getting, during the period of his lease, a more beneficial user of the demised premises.

That, I think, is exactly what was proposed here. Instead of taking any of the adjoining premises at the side, the premises were to be extended at the back, and to that new back portion the various ancillary provisions which originally were on the demised premises were to be shifted. The effect of all that was to give a more beneficial enjoyment to the lessee.

Now it is perfectly true that, for the purpose of the lease, all that is material is what happens on the actual demised premises. For the purpose of the lease it is not necessary to look beyond to other premises in other occupation ; and that being so, and the tenant's enjoyment for the period of his lease being what is considered—his enjoyment consistent with the other conditions of the lease—there does not seem to me to be any reason at all for saying that from that point of view these alterations would not be improvements of the demised premises ; that is to say, the user of the tenant during the period of the lease. Of course, if structural alterations are made, if the proposals are to be carried out, it is necessary to provide for reinstatement at the conclusion of the lease of

these premises ; and that is adequately provided for in the proposals by the undertaking of Messrs. Woolworths, supported by the guarantee of an approved insurance company. The precise terms of that undertaking may meet with some little objection, but, as I have said, no real difficulty arises about it.

In my view, therefore, not only are these proposed alterations of the demised premises alterations which are in law capable of being construed as improvements, but in fact, on the true construction of this clause, they are improvements, and, with the greatest respect, I am unable to follow the view of the learned judge on that point.

There are only two other matters which I need refer to in this connection. One is that it is said that to make these alterations and to carry on the business in the way contemplated by these alterations, that is to say, to carry on the business of Messrs. Woolworths in Nos. 18 and 20 Commercial Road and on the premises extended at the back, and to a slight extent at the side, would be a breach of the covenant which I have already read ; that is to say, that there would no longer be a use, occupation and preservation of the demised premises as a first-class shop suited to the neighbourhood. I am entirely unable to think that what is proposed would be any breach of that covenant. The premises would be used as a first-class shop, just as much as before the alteration. The covenant itself seems to me to be directed to some entirely different danger or risk—namely, that the premises would be used for some other purpose than that of a first-class shop, and there would be a breach clearly if it was sought to use those premises as a motor garage, or as a cinema, or for any other purpose of that sort. In my view, if these alterations are effected and the business is carried on as contemplated, these premises would still be used as a first-class shop, though there are attached to those premises, and indeed forming part of the first-class shop, some other premises not part of the demised premises.

In a case of this sort it may be necessary to consider the exact nature of the alterations, in order to see whether or not they constitute any breach of covenants such as covenant (xi).

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In the circumstances of the present case, I do not think that the contemplated use of the premises would amount to any breach. If hereafter it turned out that the premises were being used in a way which was contrary to clause (xi.), the question would then be open; but at present I see no reason to think that any breach of that covenant would be committed. As to covenant (xii.), to which I have already referred, though these alterations would involve pulling down a wall and removing certain ancillary apparatus from the building and would change the construction in various other respects in the way I have indicated, I do not think that that constitutes any waste, spoil or destruction of the premises within the meaning of condition (xii.). I do not intend to discuss that any further, because to my mind that condition has no reference to anything of this sort.

It is not necessary to consider clause 3, condition (ii.). I am quite satisfied to say that the proposed alteration would constitute, as far as I can see, no breach of any of the covenants of this lease. That being so, the matter of debate now, in my opinion, is left entirely to rest on this one issue of whether 7000*l.* was or was not a reasonable sum to demand. If it had been proved that it was an unreasonable sum to demand, then I think the tenant would have succeeded in proving that consent was unreasonably withheld. I have not come to that conclusion. On the evidence before me, I apprehend the matter will be open now. Attempts have been made to induce the defendants to agree to submit this one issue to arbitration. They are not bound to submit it to arbitration, and the plaintiffs, therefore, if they desire to proceed in this matter, and if my view of the construction and application of the section to the facts of this case prevails, will be able to take such action as they think fit in order to meet this serious difficulty about the question of the reasonable sum. I do not pretend to follow out the various possibilities, some of which have been considered in the course of the argument. It is enough to say that, for the reasons I have given, however unsatisfactory the result may appear, this appeal fails and should be dismissed with costs.

ROMER L.J. The plaintiffs in this case allege that the defendants, their landlords, have unreasonably withheld their consent to the making by the plaintiffs of certain alleged improvements on the demised premises, and they claim two declarations. The first declaration is, that in the events which have happened, which means, the defendants having unreasonably withheld their consent to the making of the improvements, the defendants are not entitled to withhold their licence or consent any further. That declaration is based upon a misapprehension of the true effect of a covenant not to do something without the licence of the landlord, such licence not to be unreasonably withheld. The insertion in the covenant of the words "such licence not to be unreasonably withheld," does not amount to a positive covenant on the part of the landlords that they will not unreasonably withhold their consent, so as to compel them to grant a licence on reasonable terms. It was so held in the case of *Treloar v. Bigge* (1), and is established law. If the landlords unreasonably withhold their consent, then there is no covenant on the part of the lessees at all relating to the subject-matter, because the words, "such consent not to be unreasonably withheld," import a condition into the covenant so that the covenant is conditional upon the consent not being unreasonably withheld; the result being that, when a licence or consent is unreasonably withheld, there is no covenant on the part of the lessee at all, the condition not having been fulfilled. The first declaration, therefore, is plainly wrong, but if the declaration was to be made, the Court would necessarily have to arrive at the conclusion that the consent had been unreasonably withheld, and to that extent the first declaration sought may be by a beneficent construction regarded as a declaration that the landlords have withheld their consent unreasonably. I will come back to that in a moment. The second declaration is this: that in the events which have happened (that is consent being unreasonably withheld) the plaintiffs are entitled to make the said improvements without any further request for licence or consent on the part of the

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C. A. defendants, but subject to the plaintiffs doing various things.
1936 The third thing is: "Paying to the defendants such sum
F. W. (if any) as this honourable Court shall deem to be reasonable
WOOLWORTH in respect of the damage (if any) to the demised premises or
& Co. the diminution in value (if any) of the demised premises to
v. be caused by the carrying out of the said improvements." In
LAMBERT. other words, the plaintiff is coming to the Court and saying:
Romer L.J. "Please tell me what would be a reasonable sum for the
defendants to insist upon being paid as representing the
damage they have suffered in respect of their reversion."
Clauson J. took the view that the Court had no jurisdiction
to answer a question put to him in that way, and I agree
with him. In my opinion this declaration could not possibly
be made even though the Court came to the conclusion that
the defendants hitherto have unreasonably withheld their
consent.

I said I would come back to declaration 1, and I will treat
it now as though the plaintiffs were asking for a declaration
that the defendants had unreasonably withheld their consent.
Mr. Fergus Morton on behalf of the plaintiffs said that they
had unreasonably withheld their consent, as I understood his
argument, not solely because the terms they had put forward
in a letter on p. 20 of the correspondence were unreasonable,
but because it was unreasonable on the part of the defendants
to have refused an offer which the plaintiffs themselves had
made in a letter which is to be found on p. 22 of the
correspondence, the date of which does not very much matter.
The question whether the terms offered by the defendants
were unreasonable depends entirely upon the question whether
they might reasonably ask for payment of 7000*l.* in respect
of the damage to be sustained by their reversion, because
the other terms which they suggested are agreed by the
plaintiffs to be quite reasonable, the terms being a covenant
of reinstatement supported by a policy. The question
whether the counter-offer put forward by the plaintiffs was
one which the defendants ought to have reasonably accepted
really involves precisely the same point, because it would be
reasonable on the part of the defendants to refuse that offer

of the plaintiffs if the offer put forward by the defendants was a reasonable one. So that in either case the question resolves itself into this: Was the 7000*l.* offered by the defendants a reasonable sum for them to require? Clauson J., after hearing the evidence, came to the conclusion, as I read his judgment, that he was not in a position to say that the defendants had been unreasonable in making that offer. It is said by Mr. Fergus Morton that the learned judge ought to have referred that question, if he felt any doubt about it, to the decision of an official referee under s. 88 of the Judicature Act, 1925. But the plaintiffs had not asked him to do that. The plaintiffs called evidence and the defendants called evidence, and when the learned judge heard the evidence on both sides he came to the conclusion that the plaintiffs had not discharged the onus that lay upon them. It was too late for the plaintiff to say: "Well, now, as I have failed to satisfy you on this point, refer it to an official referee." I think the learned judge was right in those circumstances in dismissing the action, because the onus was clearly on the plaintiffs of proving that the defendants had unreasonably refused their consent, seeing that they came to the Court to ask for a declaration that such consent had been in fact unreasonably withheld.

In my opinion on that ground this appeal fails, but there are various other points which have been argued before us, and we have been asked by counsel to express our views upon them. By far the most important of those other questions is this: Are the alterations which the plaintiffs are desirous of making and to which they have asked the defendants to give their consent, improvements within the meaning of s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927? It has been held, and quite plainly rightly held, that the improvement may be an improvement within the meaning of the sub-section, even though it does not improve the demised premises from the point of view of the landlord. That is plain, I think, from the fact that the sub-section itself contemplates that the landlord's property may be damaged by the improvements, and that in respect of that damage he may reasonably ask for a sum to be paid to him as a condition of giving his consent.

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C. A. We, therefore, have to consider whether these alleged improvements are improvements from the point of view of the tenant.
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F. W. Of course we have only got to consider improvements of the
WOOLWORTH demised premises themselves. As I see it, the question is
& Co. this : Will these alterations render the tenants' occupation of
v. the demised premises more convenient and comfortable to
LAMBERT. them? In the course of the argument I ventured to give an
Romer L.J. illustration of an alteration of demised premises, which would be an improvement, from the tenant's point of view, in the sense that it would add to the reasonable enjoyment by him of the demised premises, even although it was an alteration in connection with premises which adjoin the demised premises. Mr. Radcliffe, as I understood him, did not dissent from the view that there might be such alterations that would be improvements within the meaning of the sub-section. One of the illustrations I put to him was this : Supposing the tenant of a demised house is the owner of land which immediately adjoins the demised premises, if he can make an entrance or a passage-way or whatever it may be from the demised premises on to this adjoining land, that may largely add to the comfortable enjoyment by him of the demised premises. No one would deny that. Another illustration I ventured to put was this. Supposing that a man owns an hotel and takes a lease of certain premises adjoining the hotel, floor to floor the same as his hotel, obviously it would add very considerably to his comfortable enjoyment of the demised premises if he could on each floor make a communication between that floor of the demised premises and the corresponding floor of his own property adjoining. I do not understand that Mr. Radcliffe would have disputed that, and that such alteration of the demised premises might be an improvement within the meaning of the sub-section. The communication might take the form of a door, but it also might take the form of an archway without a door. There would be no difference so long as at the end of the tenancy, the tenant filled up the hole that had been made, and restored the demised premises to their original condition ; nor could it make any difference, as I see it, if instead of

making an archway he removed a bit of the wall altogether, say the wall separating one room of the demised premises from the adjoining room on his own premises, and threw them all into one room, again of course on the condition that at the end of his tenancy he filled it up and restored the demised premises to their original condition. The question always would be, as I see it, whether the alteration was one which would render his enjoyment of the demised premises more convenient. Now, in the course of those alterations which I have suggested as being improvements within the meaning of the section, it might be found necessary to remove, say, a lavatory from the demised premises and replace it during the remainder of the tenancy by a lavatory on the tenant's own premises. By so doing he might have more floor space in the demised premises, and so add to the amenities of his occupation. If, as I think, that be the meaning of the word "improvement" in the sub-section, how do the facts of the present case apply? Two persons were called on behalf of the plaintiffs, a Mr. Garrett and a Mr. Goddard. They were asked from their expert point of view, whether the alterations would result in an improvement of the demised premises. Mr. Garrett said this: They added some 600 or 700 yards of actual floor space to the floors; the ground floor, the first floor and the second floor, those are the floors of the demised premises; secondly, they have the advantage of making the shop a better shop. He points out how the alterations will enable the customers coming on the demised premises to be more conveniently dealt with and more conveniently do the business they had come in to transact in Woolworths' shop. Mr. Goddard expressed the same view. He also made reference to the fact that the alterations provided more commodious accommodation for the staff in the way of lavatories and things of that kind. Then he says that it was an improvement to take away the lavatory accommodation on the demised premises, so as to give customers more room on the demised premises, and to substitute for that lavatory accommodation, lavatory accommodation on the adjoining premises of which Messrs. Woolworths have a lease. The

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C. A. alterations suggested by Messrs. Woolworths also involve the
1936 removal of the existing staircase or one of the existing staircases
F. W. on the demised premises. That again was to render the
WOOLWORTH occupation by Messrs. Woolworths of the demised premises
& Co. more satisfactory and more commodious from their own point of
v. view. The staircase and lavatory will now be upon the
LAMBERT. adjoining premises always subject to this, that when the
Romer L.J. tenancy of Messrs. Woolworths in the demised premises comes
to an end, the staircase, the lavatory and the walls will all have
to be restored in their original condition.

For these reasons I am not prepared to come to the conclusion that the things which Messrs. Woolworths are proposing to do are not strictly improvements of the demised premises within the meaning of the sub-section.

The other points are comparatively small. I entirely agree with the view which the Master of the Rolls has expressed as to the words to be found at the end of sub-s. 3 of s. 19, that is to say, they only refer to matters referred to in sub-s. 3, and do not affect sub-ss. 1 and 2. I would also like to add this. It was argued before us that every covenant not to make alterations or improvements is, within the meaning of the sub-section, a covenant not to make improvements without the licence or consent of the landlord. I cannot take that view at all, although of course it is true that every covenant can be released by the landlord if he so thinks fit. Sub-s. 1 of s. 19 deals with covenants against assignment, and long before this Act ever came into force, the difference between an absolute covenant not to assign and a covenant not to assign without the licence or consent of the landlord, was well recognised. Luxmoore J. I think once said that he had never heard of a covenant by a lessee not to make improvements. But assuming that such a covenant was common, surely there would be a difference between a covenant not to make improvements of any kind in any circumstances and a covenant not to make improvements without the consent and licence of the landlord. Indeed to hold otherwise, to accede to the argument addressed to us on this point, would be to disregard the words of the section altogether—namely, the words

“without licence or consent.” If every covenant not to make improvements and every covenant not to assign and every covenant against the alteration of the user of the demised premises is to be deemed to be a covenant not to make improvements or not to assign or not to make an alteration of the user as the case may be without the licence or consent of the landlord, then the words “without licence or consent” in the sub-sections would be otiose and useless.

The only other point I find it necessary to mention is this. It was said that there are two covenants contained in this lease, covenants that are not qualified in any way by the words “without licence or consent,” which would be broken if the lessees made the alterations in question. That was said to be important for two reasons. It was said, if that be so, the existence of those covenants was a matter which should be taken into consideration in deciding whether the landlords in demanding 7000*l.* had unreasonably withheld their consent, and secondly, that supposing the landlords had unreasonably withheld their licence and consent, the tenant nevertheless could be prevented from making these particular alterations by reason of these two covenants. The two covenants are contained in sub-ss. 11 and 12 of clause 2 of the lease. The first one is the covenant to keep the demised premises open as a first-class shop, and to use, occupy and preserve the demised premises as a first-class shop. One must read those words as part of the whole covenant. The covenant begins as follows: “Not to carry on or suffer to be carried on in or upon or about the demised premises or any part thereof any noxious or offensive trade business or calling whatsoever but to use occupy and preserve the demised premises as a first-class shop suited to the neighbourhood.” In my opinion what that covenant is dealing with is the method of user of the demised premises, that is to say, that it is dealing with the nature of the trade which can be carried on upon the demised premises. As I understand it, the lessee covenants that the trade he will carry on upon the demised premises will be that of carrying on a first-class shop, and no other. When these alterations are made Messrs.

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C. A. Woolworths, in my opinion, will be carrying on the business
1936 of a first-class shop on the demised premises, just as, as it is
F. W. admitted, they are at present.
WOOLWORTH & CO. The other covenant is one that creates greater difficulty,
v. I think. It is a covenant not to commit or suffer to be com-
LAMBERT. mitted any waste spoil or destruction on the demised premises;
Romer L.J. but it must be remembered that we have, before we get to
that covenant, the covenant in question with which we have
been dealing, No. 5, that is to say, the covenant not to make
any alterations in the demised premises, structural alterations
or additions, without the previous consent in writing of the
lessors. In those circumstances it seems to me that we must
construe this last covenant No. 12 in such a way as not to
conflict with covenant No. 5. It is almost incredible that
the lessees should have entered, first of all, into a covenant
not to do the works in question without the licence or consent
of the lessor, and that later on in the same clause of the lease
they should have covenanted that they would not make such
alterations in any circumstances. I think we must exclude
from the operation of this covenant 12 any improvement to
which the previous covenant 5 refers.

I think that now I have dealt with all the points that have
been raised in argument, although, as I said before, it is
sufficient to dispose of this case by saying, as Clauson J. said,
that the plaintiffs have not discharged the onus that lay
upon them of showing that the defendants had unreasonably
withheld their consent.

GREENE L.J. I agree that this appeal should be dismissed
on the ground stated by my Lords. On that ground I only
wish to make two observations. The first one is this: that
it is, in my judgment, a misconception to treat the relevant
sub-section here as though it were a sub-section conferring
upon the Court some remedial jurisdiction to relieve the
lessee from a covenant or to modify it. It is in truth nothing
of the kind. It is a statutory addition to the terms of a
particular type of covenant, and the proviso which the
sub-section mentions is to be read into the covenant. What

the legal consequences of that may be in relation to any particular set of facts is a matter which will fall to be determined in the usual way. It is quite wrong to look upon this as something which enables the Court to say that a particular set of terms or some particular conditions would be the reasonable thing for the lessor to impose in the circumstances. The practical question which falls to be decided in matters of dispute under this is simply the question, Aye or No, has the covenant been broken ; Aye or No, does the covenant, or does it not, apply in the particular circumstances of the case ?

The other observation I wish to make is this : that the burden of proof is on the plaintiff who alleges an unreasonable refusal by the lessor. I quite agree that if, when the matter came before him, the learned judge, in his discretion or at the request of the parties, had referred, as he could have referred, the question as to the reasonableness of the sum which the lessors were demanding, to a special referee or to an official referee, no objection could have been taken to that course.

That was not the course that the trial took, nor did the plaintiff invite the learned judge to take any such course. The plaintiff elected to deal with that issue before the learned judge himself, and he came prepared, or as he hoped, prepared, to discharge the burden that lay upon him with regard to the whole of the issue, and in particular with regard to the issue of reasonableness of the sum demanded. The learned judge held that he failed to discharge the burden. But Mr. Fergus Morton says, notwithstanding that, it would have been permissible for the learned judge, if he was not satisfied, to refer the matter, and that it would be permissible for this Court to refer the matter.

With great respect to the argument, it seems to me that that is a misconception. If the issue which is the issue in the case is tried before the learned judge, and the onus of proof is not discharged, it is, in my judgment, not permissible for the plaintiff then to say : " Give me another chance by ordering a reference or an inquiry, at which I may be able to produce more satisfactory evidence than I have produced

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at the trial." That seems to me, with all respect, to be an entirely novel conception of procedure; and it is a totally different thing to do that on the one hand, and on the other hand to do what I think would have been permissible in this case—namely, to refer the trial of that particular issue to a referee, special or official; because then that would have been the trial of that issue. As it was, the trial took place before the learned judge, and he held the onus was not discharged, and I agree with him.

With regard to the other matters that have been discussed in the case, I regret to find myself in disagreement with the judgments that have been delivered regarding, perhaps, the most important matter in this case. That question is whether the proposed works are improvements within the meaning of the sub-section. I must confess that to find described in an Act of Parliament as improvements to demised premises an alteration which involves removing the whole of the wall up to, say, three storeys on one side, and part of the wall up three storeys on another; the removal of the staircase; the removal of the heating and ventilation apparatuses; and the removal of the lavatories; to find an Act of Parliament referring to those alterations as improvements of demised premises, is, to my mind, something rather startling. If the Legislature, on the true construction of the section, has so said, then all I can say is that its choice of language has been more than usually infelicitous. I approach this sub-section, not from the point of view that it would have been reasonable for the Legislature to have made provision enabling tenants to do what may very well be a very useful thing, but from the point of view that it is only from the language of the sub-section that I am able to discover whether the object of the Legislature was to effect a quite limited alteration in the law, or to make an alteration of a very wide and far-reaching description; and I myself can find no assistance in the solution of that problem beyond such assistance as is given by the language used. I therefore venture to make a few observations on the construction of the sub-section.

First of all I think it is fair to observe this: that the

improvements which are referred to must be improvements to what is the subject-matter of the relevant covenant, and if it is not possible to predicate of any alterations that they are improvements to the subject-matter of the covenant, to wit, the demised premises, they will not be improvements within the meaning of the sub-section.

I am in agreement to this extent with what has been said: that in considering whether a thing is an improvement or not, the point of view of the tenant is to be regarded, not necessarily exclusively, but his point of view is a thing which ought to be regarded. But that does not answer the question; because it is as tenant of the demised premises that his point of view is to be regarded, not as tenant of some other premises or of some composite premises. It is said by Mr. Fergus Morton that the true test of an improvement is: Is it beneficial to the carrying on of the tenant's business? I am quite unable myself to discover, in the language of this section, any justification for such a test. It seems to me that it would lead to the most extravagant results, and it is no answer to say: "Oh, those results can be provided against because there is always the question in the background whether or not the consent has been unreasonably withheld in an extreme case." That is not the point. It is not until you have decided whether a thing is an improvement or not that the question of consent comes in. Therefore it does not seem to me to be legitimate to give to the word "improvement" a meaning which leads to extravagant results and justify that by saying: "Oh, but there is a safeguard provided in the section." Just let me see what it means. Mr. Morton, in the course of the argument, in answer to a question put by myself, quite frankly, as I understood him, acceded to the point of view I put. I put to him this. Supposing it was beneficial to Messrs. Woolworths' business as carried on in the composite premises to remove the top floor of the demised premises and use what would then be the roof of the floor below as a tea garden or a restaurant, or something of that kind. Mr. Morton admitted, and I think he was bound to admit, that that would satisfy his test. It does seem to me a most

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extraordinary thing that the Legislature could have used the word "improvements" to cover such an alteration as that. The real truth of the matter, in my judgment, is this: that the test of what is beneficial to the tenant's business is not the true test. The true test, I suggest, is this, that the improvement must be an improvement to the premises which are the subject-matter of the covenant and not merely an improvement which derives its character, as such, from its effect and result upon some composite building. That reduces the matter to a question of fact and degree in each case. I quite agree that if a tenant has a house held from some lessor and has premises next door, it may very well be an improvement to make an opening from the one into the other. The reason why that would be an improvement would be this: that the existence of that opening and that means of communication is a thing which improves the subject-matter of the covenant, namely, the demised premises, from the point of view of the tenant as tenant of those premises, and does not derive its beneficial result merely from the fact that the tenant is the owner of some composite premises.

When you look at the present case, it seems to me impossible to say that the removal of the whole of this wall down one side of the premises, and a large part of another wall, can be called an improvement to the demised premises. It is desirable, and desirable only, by reason of its effect upon the composite premises, and once you have to bring that consideration in, it seems to me that you are introducing something which the section does not authorize you to introduce, because the section is concerned, and concerned only, with improvements to what is the subject-matter of the covenant.

The matter looked at from that angle becomes even more striking when one considers some of the other things which it is proposed to do. It is proposed to remove the main staircase, to remove the heating apparatus, to remove the air-conditioning apparatus, and to remove the lavatories for the male staff. All those things are parts of the demised premises, and they are going to be taken right away. Now what is the benefit of that removal? Is it possible to say that it is an

improvement to the demised premises that part of them should be taken away altogether, when the real benefit of that alteration is not a benefit to the demised premises at all, but is only a benefit when regarded in relation to the composite premises? It appears to me, with all respect, that on the facts of this case it is not possible to say that the suggested alterations fall within the meaning of the word "improvements" in the sub-section, and that the only way by which they can be made to fall within it is by putting an interpretation on that word which leads to what appear to me to be the most extravagant results.

I think that is all that I need say with regard to the meaning of the word "improvements," but there is one other matter of argument on which I wish to say something. It is this. In the lease in question there are two covenants, one relating to user and one relating to the committing of waste, spoil or destruction. With regard to both of those covenants, they are covenants which are absolute in terms, and do not contain the qualification that they are not to be done without licence or consent, and I agree that they are not covenants to which sub-s. 2 would apply. I agree respectfully with, and do not wish to add anything to, what has already been said by Romer L.J. with regard to the covenant against waste; but the covenant against user appears to me to stand in a rather different position.

I turn back for a moment to what I said at the beginning of this judgment. This section is not a section which gives some general remedial power to the Court, nor, may I add, is it a section which imposes on the lessor a statutory consent, or something of that kind. If it did, I could quite understand the argument that a statutory consent to an alteration designed with a view to a particular user would operate pro tanto as a statutory release from the covenant prohibiting that user, in exactly the same way as a consent given by the landlord himself would have done. But that is not the operation of this sub-section at all. The operation of this sub-section is merely to write in a proviso to the particular covenant, or any covenant that can be found, the effect of

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C. A. which is to prohibit the making of what are improvements.
 1936 The user covenant does not come under that category at all.
 F. W. You cannot find in the user covenant any covenant against
 WOOLWORTH the making of improvements; it is a covenant relating not
 & Co. to the alteration of the premises, but to their user.
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There are two questions that arise on this covenant. The first one is this: Assuming those alterations were made and the proposed user took place, whether that would be a user of the premises as a first-class shop suited to the neighbourhood. I am not prepared to dissent from the view that it would, but that is subject to the next question, and the next question is this. The covenant relates to a user of the demised premises. Now the demised premises include not merely the bricks and mortar, but everything which forms part of the demised premises, among other things the staircase and the heating apparatus, and other installations which are affixed to the freehold and until removed are part of the demised premises. The same applies to the men's lavatories and all the rest; and how it would be possible, after these installations have been removed from the demised premises, to use the demised premises of which they form part as a first-class shop, I, for one, quite fail to see.

What will be happening will be this. I assume here that the business of buying and selling and so forth, that element of user, will still be user as a first-class shop. But I am quite unable to see how it can be said that in those circumstances the tenant would be using the demised premises; he would be using the demised premises minus the things which he has taken away from them. The result of that will be that if the removal of those things takes place, in my opinion it will be impossible thenceforward for the covenant to be carried out. If that be so I cannot see myself that it can be said that a refusal by the lessor to an alteration the object of which is to enable the premises to be used in a way inconsistent with this covenant is unreasonable.

That, I think, deals with all the matters in the case. I need only express my agreement with the views that have been expressed as to the words at the end of sub-s. 3 of s. 19.

I am unable to see how those words can be, on a true construction, referred to the relevant sub-section with which we are dealing.

Appeal dismissed.

Solicitors : *Lovell, White & King ; Robins, Hay & Waters, for Lacey & Son, Bournemouth.*

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Considered. WHITESIDE v. WHITE-
SIDE. [1949] 1 All E.R. 755.

Approved and distinguished. WHITE-
SIDE v. WHITESIDE. [1949] 2 All E.R.
913.

Distinguished. WHITE-
SIDE v. WHITESIDE
[1950] 1 Ch. 65

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CLAUSON
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[1935. J. 237.]

*Lease—Mining lease—Coal Mine—Royalties—Memorandum of terms—
“Free of tax”—Income Tax Acts—Intention of parties—Evidence
—Rectification—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), All
Schedules Rules, r. 23.*

By r. 23 of the General Rules applicable to Schs. A, B, C, D and E of the Income Tax Act, 1918 :—

(1.) “A person who refuses to allow a deduction of tax authorised by this Act to be made out of any payment, shall forfeit the sum of fifty pounds.

(2.) “Every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void.”

The plaintiff and the first defendant verbally agreed that the first defendant should take a lease of the plaintiff's coal mine and pay the plaintiff a royalty of three pence per ton free of tax on all coal sold. The terms of this agreement were set out in a memorandum signed by the plaintiff containing the words “free of tax” in the plaintiff's writing.

The lease provided that the first defendant should pay the rent therein mentioned and the royalty free of tax. He carried out both provisions until he assigned the lease to the defendant company, and he did not pay the income tax on the royalty. The company continued to pay the royalty free of tax, and also not to pay the income tax thereon, until the Inland Revenue authorities demanded it. It was then paid to date, and the company deducted the whole of it from the current instalment of royalty, and claimed to be entitled to deduct it rateably from future instalments, on the ground that the provision in the lease for the payment of royalty free of tax was in contravention of the Income Tax Acts.

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On a claim by the plaintiff for rectification of the lease by substituting for the provision for the payment of the royalty of three pence free of tax a provision for the payment of a royalty of such an amount as after the deduction of income tax of the standard rate from time to time should leave three pence :—

Held, that there was "strong irrefragable evidence" of the parties' intention on executing the lease, and that it must be rectified in accordance with the plaintiff's claim.

Dictum of Lord Thurlow L.C. in *Shelburne v. Inchiquin* (1784) 1 Bro. C. C. 338, 341, and *Burroughes v. Abbott* [1922] 1 Ch. 86, followed.

WITNESS ACTION.

This was an action for rectification of a mining lease which reserved a royalty to the lessor, who was the plaintiff. The defendants were the lessee and a company to which he assigned the lease.

In October, 1931, Mr. Frederick Jervis (hereinafter called "the plaintiff") and Mr. George Howle (hereinafter called "the first defendant") were minded to enter into certain arrangements with regard to a shaft, and certain land around it, at Talke, Staffordshire, belonging to the plaintiff, which the first defendant desired to use for access to the minerals, of which the first defendant had obtained a lease from the mineral owner. After some discussion they came to terms, which were that the royalty for the use of the shaft should be three pence per ton of coal sold, free of tax. That arrangement was embodied in a document dated October 25, 1931, which was as follows :—

"I, F. Jervis, of Crown Bank, Talke, agree to allow George Howle, of 37 Warwick Street, Chesterton, to enter No. 2 Shaft, Talke, and to use a portion of land surrounding same shaft (area to be agreed upon) in consideration of receiving from him three pence per ton of coal sold.

This agreement to be legalized. George Howle to pay costs of such agreement. Free of tax.

Dated this 25th day of October, 1931.

F. Jervis."

The first defendant had the document typed, and the plaintiff inserted into it the words "free of tax." A draft lease providing for payment of the royalty was prepared by

the first defendant's solicitor, and the engrossments, dated June 3, 1932, were exchanged. Clause 4 of the lease provided : " The lessee . . . shall pay for every acre of the demised premises that shall be entered upon and used and occupied by the lessee . . . the yearly rent of 5*l.*, together with a royalty of three pence per ton on all coal sold by the lessee, such royalty to be paid free of tax on the 25th day of March and the 29th day of September in every year. . . . " Clause 5 provided : " All the said rents (shall be) calculated and save as aforesaid shall be paid without any deduction except for landlord's property tax."

By a deed dated May 5, 1933, the first defendant assigned the lease and his interest in the minerals to the defendant company, of which he was managing director and in the capital of which he owned half the shares. For three years the royalties, as they fell due, were paid without deduction. During that period, the defendants did not pay the income tax. The Commissioners of Inland Revenue then demanded it, and it was paid.

In March, 1935, the defendant company deducted from the payment of the royalty which was then made the income tax on that royalty and on the royalties paid during the three previous years. The plaintiff thereupon brought this action, by which he claimed rectification of the lease by omitting the words " of three pence " and " free of tax " in clause 4 and inserting after the words " by the lessee " and before the words " such royalty " the words " of such an amount as after deduction of income tax at the standard rate from time to time shall leave the sum of three pence." He claimed also judgment for payment to him of what had been deducted by the defendant company.

The defendant company claimed that it was entitled to deduct the tax from the royalties becoming due under the lease, as the provision in the lease for payment of royalties in full without deducting income tax was in contravention of the Income Tax Acts.

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Herbert Hart for the plaintiff. A case bearing on the point

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which arises here is *Burroughes v. Abbott*. (1) There the deed which it was sought to rectify had been executed with the intention of complying with an order of the Divorce Court on a husband to secure annuities free of income tax: and P. O. Lawrence J. took the view that it had been executed in the belief that it had that effect, and ordered rectification accordingly.

[He referred to *Stone v. Godfrey*. (2)]

Heckscher for the defendants. *Burroughes v. Abbott* (3) was a decision on a special state of facts, in which the Court was trying to carry out an order of the Divorce Court.

CLAUSON J. [after stating the facts:] The plaintiff and the first defendant are neither of them of very wide business experience or very wide culture, but both of them sensible and clear-headed. It is quite clear from the evidence that what they meant by the terms to which they came was that the plaintiff should get his three pence royalty on every ton of coal sold, and should not have to bear any of the tax on it. The first defendant, rather rashly, in the witness-box suggested that he did not appreciate that "tax" meant income tax, but that he realized that the tax was the same sort of thing as landlord's property tax: but I am quite clear that both knew what they were bargaining about.

I have seen the defendants' solicitor in the witness-box. He said that nothing was further from his mind than that the General Rules under the Income Tax Acts would have a certain operation upon the validity of an agreement for payment of the annual payments in full without allowing for deduction, and I accept his evidence entirely.

Counsel for the defendants admitted that the defendant company was not entitled to deduct from the payment of the royalty made in March, 1935, the income tax on the royalties paid during the three previous years: but he contended that it is entitled to deduct the income tax on the payment of royalty made in March, 1935, and on all future payments.

(1) [1922] 1 Ch. 86, 95.

(2) (1854) 5 De G. M. & G. 76.

(3) [1922] 1 Ch. 86.

The plaintiff's case is that the rectification for which he asks will bring the lease into precise conformity with the intention of the parties. I find as a fact, and without the slightest hesitation, that there is what Lord Thurlow L.C., in the year 1784, called, in *Shelburne v. Inchiquin* (1), "strong irrefragable evidence" that when the parties executed the lease they thought that its effect would be what in fact it would be if the lease were rectified as the plaintiff asks: and I am bound to direct rectification in accordance with the plaintiff's claim.

There is authority precisely in point in *Burroughes v. Abbott*. (2) The facts are not exactly similar, because the document in question there was aimed at carrying out a judgment of the Divorce Court. That judgment of the Divorce Court played exactly the same part in that case as the memorandum of October 25, 1931, does in the case before me. In that case P. O. Lawrence J. held that the parties executed the deed in the full belief that it had the effect of securing the payment to the plaintiff of the annuities free of income tax. In the present case I hold that the parties executed the lease in the full belief that it secured to the plaintiff payment of the royalties free of income tax, and I am bound to follow P. O. Lawrence J. by directing rectification in this case.

[His Lordship also gave judgment for payment to the plaintiff of the income tax that had been deducted from the payment of royalty made in March, 1935.]

Solicitors: *Waterhouse & Co., for Sherratt, Nelson & Mason, Kidsgrove; Maude & Tunncliffe, for Frederick Griffiths, Kidsgrove.*

(1) 1 Bro. C. C. 338, 341.

(2) [1922] 1 Ch. 86.

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[1936. C. 573.]

Practice—Trustees of public undertaking—Statutory powers—Extent—Construction of private Act of Parliament—Summons for determination—No exercise of powers attempted—Whether declaration should be made—Discretion of Court—R. S. C., Order LIVA., r. 1A.

The Clerk to the Carnarvon Harbour Board took out a summons under Order LIVA., r. 1A, to which the Attorney-General, as representing the public, was made the defendant, to determine whether the Board, as trustees for the purposes of putting into execution the Carnarvon Harbour Acts, 1793 to 1903, had all the powers conferred by s. 29 of the Settled Land Act, 1925, on a tenant for life and on the trustees of a settlement, and could exercise the powers of sale and leasing thereby conferred, without regard to the provisions as to advertisement and public auction contained in s. 24 of the Carnarvon Harbour Act, 1809, as amended by the Pier and Harbour Orders Confirmation Act, 1877 (No. 3). They had at no time so purported to exercise the powers in question :—

Held, that, no particular exercise of any power being called in question, the Court should not entertain the application. If the trustees of the Board were to purport to exercise any particular power, the Attorney-General would have a discretion whether or not to intervene, and an individual claiming to be aggrieved by the purported exercise of the power might have a right of action without the intervention of the Attorney-General.

The making of a declaration might fetter the Attorney-General in the exercise of his discretion, and the declaration might not be binding upon an individual claiming to be aggrieved by the purported exercise of a particular power, or, if it were, it might well be a cause of grievance to a person who desired to bring proceedings himself.

ADJOURNED SUMMONS.

The Carnarvon Harbour Act, 1809 (1), amended by the Pier and Harbour Orders Confirmation Act, 1877 (No. 3) (2), gave the trustees for the purposes of putting into execution the Carnarvon Harbour Acts, 1793 to 1903, certain powers of selling the buildings, hereditaments and premises vested in them and of granting ordinary or special leases.

(1) 49 Geo. 3, c. xxiv.

(2) 40 & 41 Vict. c. lxxiv.

Sect. 24 as amended provided : " And be it further enacted, that it shall not be lawful for, nor in the power of, the said trustees to sell any of the premises aforesaid, nor any part thereof, nor to grant any of the said ordinary or special leases, without advertising the same not less than once a fortnight for three calendar months prior to the day to be fixed for that purpose in some newspaper published and circulated in North Wales, and then to be sold or leased by public auction to the highest bidder. . . . "

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The Carnarvon Harbour Board, the trustees under the Act, held as part of their undertaking property including offices, warehouses, and other buildings and also land unbuilt on in the vicinity of the harbour and docks of Carnarvon. The Clerk to the Board took out this summons under Order LIVA., r. 1A, to determine (1.) whether the trustees had, by virtue of s. 29 of the Settled Land Act, 1925 (1), with regard to land forming part of their undertaking, all the powers which were by that Act conferred on a tenant for life and on the trustees of a settlement, and (2.) whether, if that were the case, the powers of sale and leasing conferred by that Act were exercisable without regard to the provisions as to advertisement and public auction contained in s. 24 of the Carnarvon Harbour Act, 1809, as subsequently amended. The trustees had not purported so to exercise the powers in question, never having dealt with the property without complying with the requirements of the section. The Attorney-General, as representing the public, was the only defendant to the summons.

Montgomery K.C. and *Beebee* for the plaintiff. The trustees wish to deal with part of the land forming part of their undertaking, and to avoid the expense and delay involved

(1) (15 Geo. 5, c. 18), s. 29 : shall, without constituting them
" (1.) For the purposes of this section, all land vested or to be
vested in trustees on or for
charitable, ecclesiastical, or public
trusts or purposes shall be deemed
to be settled land, and the trustees
statutory owners, have in refer-
ence to the land, all the powers
which are by this Act conferred
on a tenant for life and on the
trustees of a settlement."

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in compliance with the requirements of s. 24, which is found to have become a mere matter of form. For their own protection and in order to prevent possible objection by intending lessees, they desire a decision of the Court. These proceedings have been correctly instituted and it is in just such a case as this that the discretion of the Court to make a declaration should be exercised in favour of the trustees, who hold the property for public purposes. The whole point of these proceedings is that no facts are involved and that the only question is as to the construction of the statutes. This is a matter which affects the public and in which the public should be represented by the Attorney-General. It is extremely desirable that the Court should give judgment as to the effect of these Acts. When a declaration as to the meaning of a statute is necessary and the public is interested, the case is analogous to those in which a charity is involved, and the Attorney-General may be made a defendant.

Sir Donald Somervell A.-G. and Andrewes Uthwatt (J. W. Brunyate with them) for the defendant. The Attorney-General cannot properly be made a party to such proceedings as these. No legal right of the Crown is in question and no person has been aggrieved by an actual exercise of the powers claimed by the trustees. The Attorney-General may be made a defendant in proceedings when a question arises in respect of a legal right of the Crown impinging upon the administration of a trust: *Hodge v. Attorney-General* (1); Robertson's Civil Proceedings by and against the Crown, pp. 482-485. Again, the Attorney-General, as representing the Crown, may be made a defendant when a declaratory judgment under Order xxv., r. 5, is sought to test the validity of the exercise of statutory powers by a Government department: *Dyson v. Attorney-General*. (2) It is to be noted that in *Duke of Bedford v. Ellis* (3) members of the House of Lords observed that they did not see why it had been thought necessary to join the Attorney-General. The Attorney-General can also be made a defendant in proceedings relating to charities. In

(1) (1839) 3 Y. & C. 342.

(2) [1911] 1 K. B. 410, 415.

(3) [1899] 1 Ch. 494; [1901]

A. C. 1, 11, 23.

such cases his position is peculiar. He represents the Crown, who as *parens patriae* is protector of all charities: *Governors of Christ's Hospital v. Attorney-General* (1); *Warden and Brethren of Clum Hospital v. Lord Powys* (2); *Wellbeloved v. Jones* (3); *In re King*; *Jackson v. Attorney-General*. (4) The present case falls into none of these categories.

Further, the Attorney-General has power to take proceedings to prevent the misconduct of public authorities in exceeding their powers: *Attorney-General v. Compton* (5); *Attorney-General v. Shrewsbury (Kingsland) Bridge Co.* (6) But he has a discretion whether or not to go to the Court. In *Attorney-General v. London County Council* Lord Halsbury L.C. said (7): "If there is an excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not." To make the declaration now asked for would fetter the discretion of the Attorney-General in deciding in the future whether or not to take proceedings.

Montgomery K.C. in reply.

FARWELL J. This is a summons taken out under Order LIVA., r. 1A, which provides that: "In any Division of the High Court any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed." The parties to the summons are these: The plaintiff is the Clerk to the trustees of the Carnarvon Harbour Board, he being the proper officer to sue under the provisions of their private Act, and the defendant is His Majesty's Attorney-General. The summons is brought for the purpose of obtaining the

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(1) (1846) 5 Hare, 257.

(2) (1842) 6 Jur. 252.

(3) (1822) 1 Sim. & St. 40.

(4) [1917] 2 Ch. 420, 428.

(5) (1842) 1 Y. & C. C. C. 417,
426.

(6) (1882) 21 Ch. D. 752.

(7) [1902] A. C. 165, 168.

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determination by the Court whether, having regard to the provisions of the Settled Land Act, 1925, and certain relative provisions in the private Acts of the Board, the powers which are given by the Settled Land Act, so far as they are wider than the powers given by the private Acts, may be exercised, and to that extent the powers of the private Act may be treated as extended.

The Attorney-General has taken the objection that the Court ought not to entertain the application at all, as this is not a case where the trustees have purported to exercise some power, and some person who thinks himself aggrieved by the exercise of that power is seeking to obtain relief, nor is it a case where the Attorney-General himself is taking proceedings to obtain an order on the trustees not to do that which he alleges is in breach of their duty. The trustees of the Harbour Board are asking the Court to make a declaration as to their powers in respect of leasing and otherwise although there is no immediate question to be decided in respect of those powers. That the Court has power to make declaratory judgments is plain and is expressly provided by Order xxv., r. 5: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not." That power given to the Court to make declaratory judgments is purely discretionary, and the Court is not bound to entertain such an application except in a proper case. If authority is wanted for that proposition it is to be found, amongst other places, in the judgment of Farwell L.J. in *Dyson v. Attorney-General*. (1)

The first question I have to consider is whether the Court ought to determine what is the extent of the plaintiff's powers in proceedings to which the Attorney-General is the only defendant and in which no particular exercise of any power is called in question.

There is no doubt that in the case of charities the

(1) [1911] 1 K. B. 410, 423.

Attorney-General's position is in some senses peculiar. He represents all charities generally, and in any case where there is a gift for a charitable purpose without any definition of a particular charity, the Attorney-General is necessarily a party to all proceedings taken in connection with any such gift, because there is no one else who can represent charity in general. Where there is a named charity and there is no doubt as to its identity, it is not always necessary to make the Attorney-General a party to proceedings; but in any case where there is a general charitable intention but no defined charity, then of necessity the Attorney-General is a party to any proceedings in connection with them, because the Crown as *parens patriæ* is protector of all charities. The Attorney-General as representing the Crown can always be made a defendant in such proceedings, and no objection can be taken to his being so made a defendant, although he himself might never have desired that the proceedings should be taken. Further, in connection with charities, he is always in the position to move the Court himself, in cases where some breach of a charitable trust is being committed, in order to prevent the continuance of that breach and to have the matter put right. In many cases of that kind there is no one else who is in a position to move the Court, and for that reason the Attorney-General is entitled and bound to take the necessary steps.

But, in my judgment, those considerations in connection with charities do not touch the point which I have to consider. Here the trustees of the Harbour Board have certain powers given them. They might bona fide but wrongly exercise those powers in a manner inconsistent with the powers given to them by Parliament, for instance by granting a lease to some particular individual in such a way as to be ultra vires, which might in certain circumstances give the lessee a cause of action against the Harbour Board. No doubt in such a case as that the Attorney-General would be entitled to intervene, if he thought fit; but it would be purely a matter in his discretion whether he would take any proceedings or not, and it might well be that in some case where there was

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some technical breach of their powers by the trustees, he might consider that the exercise of the power on the whole was a beneficial one, and would not choose to take proceedings to interfere. It would be a matter for the Attorney-General alone to determine, whether he would take any steps in such a case as that. If the plaintiff in this case is entitled to the relief which he seeks, in some cases the decision might operate to fetter the Attorney-General's discretion in the future.

I am not able to find in any of the authorities which have been cited to me any case which is on all fours with the present one, which, as it seems to me, involves a question of real importance, because at the present moment there are no doubt many trustees of public institutions or public undertakings who would be only too glad to know what the true interpretation of their private Acts may be in connection with subsequent public legislation. If the Court is bound in this case to entertain this application it might be that there would be many other applications of a similar kind raising all sorts of questions in connection with Acts of Parliament. That, of course, is not in itself any reason for saying that this application should not be entertained, but it shows what may be the importance of this case, and I think the Court ought to consider the question very carefully, not merely because a heavy burden might be thrown upon the Attorney-General, but because it is a matter of real importance whether in a case of this kind it ought not to be left to the Attorney-General to take such steps as he thinks fit to move the Court to restrain anything which he considers an improper use of the powers given to the trustees rather than to permit the trustees themselves to bring proceedings and obtain a decision upon a point which is not a practical one at the moment.

The nearest case to the present of any of those that have been cited is, as it seems to me, that of *Dyson v. Attorney-General* (1), to which I have already referred. That was a decision of the Court of Appeal in which it was held that the Court ought to make a declaratory judgment. It is necessary to look a little closely at that decision to see precisely

(1) [1911] 1 K. B. 410.

what was decided. In that case an action was brought against the Attorney-General by a member of the public to test the validity of a notice issued by the Commissioners of Inland Revenue, a notice which was at the time very familiarly known as Form IV. Many members of the public strongly objected to what they thought was the inquisitorial method adopted by the Commissioners of Inland Revenue in connection with Form IV., and one member of the public brought an action against the Attorney-General for a declaration that it was ultra vires the Commissioners to serve such forms upon the public and require them to answer the questions contained in them. The Court of Appeal in that case came to the conclusion that the proceeding ought to be entertained. I desire to refer to one or two passages in the judgment of Farwell L.J. for the purpose of seeing precisely what were the principles on which the Court proceeded. The Lord Justice says (1): "In a case like the present the Attorney-General is properly made defendant. It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its equity side (see *Deare v. Attorney-General* (2)), could and did make declarations and orders which did affect the rights of the Crown." Then he cited certain cases to which I need not refer, and having observed that it had been argued that there is no precedent for such an order as was asked in that action, he pointed out that it might be that before the Judicature Act the Court of Chancery would not make declaratory orders, but since then the Court had power to do so. The judgment continues (3): "But the Court is not bound to make declaratory orders and would refuse to do so unless in proper cases, and would punish with costs persons who might bring unnecessary actions:

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(1) [1911] 1 K. B. 410, 421, 422. (2) (1835) 1 Y. & C. Ex. Eq. 197, 208.

(3) [1911] 1 K. B. 410, 423.

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there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials." There the learned Lord Justice is pointing out that it is in the public interest that a person who has a cause of complaint should be able to get relief speedily and easily from the Court. That is a wholly different proposition from the proposition that the trustees of a public undertaking of this kind are entitled, whenever they are faced with a question of construction of their own Act, or their own Act in combination with other Acts, to come to the Court making the Attorney-General a party and demanding a decision upon a question of doubt which has not actually arisen.

It is in each case a question of discretion whether the Court ought to make a declaratory order and, in my judgment, in such a case as the present the Court ought not to exercise its discretion by making such an order. If and when the Board acts in a way which the Attorney-General considers *ultra vires*, it will be for him to determine whether he will take proceedings or not. In my judgment, the Court ought not in a case of this kind to make an order which would or might have the effect of fettering the discretion vested in the Attorney-General.

Apart from that it seems to me that there is another difficulty in the way of the plaintiff. I will assume that the trustees exercise bona fide the power of leasing which they have and grant to a person a lease which is ultimately decided by the Court in proceedings between the Board and the lessee to be invalid as being *ultra vires*, with the result that the person aggrieved may be entitled to relief. That relief he could seek, as it appears to me, on his own behalf and without joining the Attorney-General. I am not at all satisfied that were I to make a declaration to-day in these proceedings such a declaration would bind a person in the position of the supposed lessee. If it would not, then no

decision on this summons will prevent litigation in the future. If, on the other hand, a decision in such proceedings as these were held to be binding on every one, that might well be a cause of grievance to the person who desired to bring proceedings himself against the trustees.

In all the circumstances of the case I think I ought not to entertain this application, and accordingly this summons must be dismissed with costs.

Solicitors: *Hatchett Jones & Co., for Trevor Roberts & Simons, Carnarvon*; *Treasury Solicitor.*

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BEDDOES v. SHAW.

[1935. B. 2487.]

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July 2, 3.

Mortgage—Notice of trusts affecting mortgage debts—Equitable interests—Priorities—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 113.

The provisions of s. 113 of the Law of Property Act, 1925, are merely concerned with relieving persons who are investigating title to land from being affected by notice of and from making inquiries into equitable interests, of which they may have actual or constructive notice, relating to the money secured by mortgages on the land.

There is nothing in the section giving to a person who acquires an equitable interest in the mortgage debt last in point of time a better equity than that of a person whose equitable interest is earlier in point of time.

ACTION.

On April 10, 1924, Job Beddoes paid to a firm of solicitors at Oswestry, practising under the name of Ferrington & Jackson, the sum of 2000*l.*, in order that it might be temporarily invested in securities.

On April 11, 1924, Ferrington & Jackson advanced to Mrs. Jones on the security of a mortgage on certain property known as Pantglas Uchaf, in the county of Denbigh, 2000*l.* out of moneys stated to belong to them on a joint account.

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Job Beddoes died on September 30, 1924. On February 14, 1925, probate of his will was granted to the plaintiff (his widow) and W. J. Gregory, a cousin of the testator employed in the office of Ferrington & Jackson. Ferrington & Jackson admitted to the plaintiff that Mrs. Jones's mortgage formed part of the plaintiff's estate, and they paid to her interest on that mortgage; and, in the year 1932, they sent to her an account of interest due from them to her, including interest on this mortgage debt and referring to it.

Ferrington died in 1929 and Jackson was adjudicated bankrupt in 1934.

On the basis of these facts the plaintiff commenced this action in which she claimed a declaration that, as the surviving executor and trustee of the will of Job Beddoes, she was entitled to the mortgage debt and the security, her claim resting on an equitable title resulting from what was in effect a declaration of trust in her favour by the persons in whom the legal estate in the mortgaged property and mortgage debt were vested.

The defendant Arthur Shaw also claimed an interest in this mortgage debt and the security for it, alleging that in April, 1931, seven years after Job Beddoes had paid 2000*l.* to Ferrington & Jackson, he had 2000*l.* in the hands of the firm; that Ferrington & Jackson, in their books, treated his 2000*l.* as having been used to pay off the 2000*l.* which Job Beddoes originally paid; and that thereafter Ferrington & Jackson, by paying him interest on the mortgage, admitted that they held for him the mortgage debt and the security for it. His claim rested in substance on something equivalent to a declaration of trust subsequent in point of time to the declaration of trust under which the plaintiff claimed.

The defendant Fanny Gregory's case arose from facts which occurred in 1932, and which were admitted by the plaintiff's solicitor. In July, 1932, this defendant, with a view to the investment of the proceeds of sale, sold certain war stock through her solicitor H. Jackson, who was then practising as "Ferrington & Jackson." The proceeds of sale, amounting to 2025*l.*, were credited to her in the books of the firm and she was informed that 2000*l.* of the said 2025*l.* had been invested

by the firm on mortgage of the property described in the mortgage deed. BENNETT J.

She pressed the firm to deliver the title-deeds of the mortgage to her, and they were delivered to her with a certificate attached, which was in the following terms: "We hereby certify that the sum of two thousand pounds (2000*l.*) the principal money owing on the attached security is the money of and belongs to you And we undertake at your request to transfer the security into your name and to pay you the interest thereon at 5 per cent. as and when received. (Sgd.) Ferrington & Jackson."

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Thereafter, until the bankruptcy of H. Jackson she received interest on the mortgage, and at the date of the hearing of the action she still retained the mortgage and the title-deeds. She had no notice that H. Jackson was a trustee of the money secured by the mortgage. She dealt in good faith with H. Jackson, and stated that she had no notice of any trust and that she was entitled to conclude that H. Jackson had promised to give her a valid receipt without investigating the equitable title.

L. M. Jopling for the plaintiff. Sect. 113 of the Law of Property Act, 1925 (1), does not alter the general law that

(1) Sect. 113 of the Law of Property Act, 1925, provides: "(1.) A person dealing in good faith with a mortgagee, or with the mortgagor if the mortgage has been discharged released or postponed as to the whole or any part of the mortgaged property, shall not be concerned with any trust at any time affecting the mortgage money or the income thereof, whether or not he has notice of the trust, and may assume unless the contrary is expressly stated in the instruments relating to the mortgage—

(b) that the mortgagee has or had power to give valid receipts for the purchase money or mortgage money and the income thereof (including any arrears of interest) and to release or postpone the priority of the mortgage debt or any part thereof or to deal with the same or the mortgaged property or any part thereof;

without investigating the equitable title to the mortgage debt or the appointment or discharge of trustees in reference thereto.

(2.) This section applies to mortgages made before or after the commencement of this Act, but only as respects dealings effected after such commencement.

(a) that the mortgagees (if more than one) are or were entitled to the mortgage money on a joint account; and

BENNETT J. it is only a person who takes the legal estate without notice, actual or constructive, who takes it free from equities. A person taking an equitable title takes subject to all equities having priority in time, whether he has notice of them or not. The law in that respect has not been changed, except that he does not get constructive notice and need not investigate equities in certain cases. The vital words of the section are "without investigating." A person can buy the legal estate in the mortgaged land without having constructive notice of an equity affecting the mortgage money. [He referred to *In re Blaiberg & Abrahams*. (1)] The general rule as to priority of equitable interests has not been altered.

G. P. Slade for the defendant Arthur Shaw.

H. Johnston for the defendant Fanny Gregory. The declaration of trust in favour of the plaintiff is earlier than the declaration of trust in my client's favour. The effect of s. 113 of the Law of Property Act, 1925, is that my client is not affected by the prior equity.

BENNETT J. This is an action between Hannah Beddoes, as plaintiff, and Arthur Shaw and Fanny Owen Gregory, as defendants; and the question to be decided is who is entitled to the mortgage debt of 2000*l.* secured by a mortgage dated April 11, 1924, granted by one Mary Jones to G. W. Ferrington and Henry Jackson, and the security for that debt, which is certain property known as Pantglas Uchaf in the county of Denbigh.

The debt seems to be at law vested either in Henry Jackson or his trustee in bankruptcy, and so is the security for the debt; but I understand that the solicitor of Henry Jackson and of his trustee in bankruptcy has stated on their behalf that neither of them makes any beneficial claim either to the debt or to the security. I think, however, that any declaration which I make must be without prejudice to any claim

(3.) This section does not affect the liability of any person in whom the mortgage debt is vested for the purposes of any trust to give effect to that trust."
(1) [1899] 2 Ch. 340.

which Henry Jackson or his trustee in bankruptcy may have, because neither of them is a party to the action.

The question falls to be decided almost entirely on admissions which the parties and their solicitors were wise enough to make with a view to saving expense to their clients. [After stating the facts and reading the section, his Lordship continued:] What has been argued by Mr. Johnston on behalf of Mrs. Gregory is that his client was dealing in good faith with the mortgagee; that she was not concerned with any trust at any time affecting the mortgage money; that she was entitled to assume that the mortgagee had power to give valid receipts for mortgage money and to deal with it or any part thereof; and, that being so, that she has got a better title than the plaintiff.

The fallacy underlying that argument as it seems to me is in supposing that s. 113 of the Law of Property Act, 1925, was intended to alter the law as laid down in this Court with regard to equitable interests *inter se*. The section is, in my judgment, merely concerned with relieving persons who are investigating title from making inquiries into equitable interests in respect of which they may have actual or constructive notice.

I cannot come to the conclusion that the section has the startling effect for which Mr. Johnston contends—namely, that it gives a person who acquires an equitable interest last in point of time a better equity than that of a person whose equitable interest is earlier in point of time.

One point was advanced on behalf of the defendant Shaw by Mr. Slade, which depended on his being able to establish that the firm of Ferrington & Jackson were general agents of the plaintiff and her co-executor, Mr. Gregory, until he died. No facts were, however, established from which it would be possible for me to draw the inference that there ever was such a relationship.

The outcome of the whole action is that I make a declaration that the plaintiff, as the surviving executor and trustee of Job Beddoes, is entitled to the mortgage debt of 2000*l.* and the security therefor, and there will be an order on

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BENNETT Mrs. Gregory to deliver up the mortgage deed and the documents
J. of title. The order must be prefaced by a statement that it
1936 is without prejudice to the rights of Henry Jackson and his
BEDDOES trustee in bankruptcy.
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Solicitors: *Gregory, Rowcliffe & Co., for Harrison & Sons, Welshpool; Gibson & Weldon, for Crampton Pym, Oswestry; and Field, Roscoe & Co., for Minshall, Pugh & Co., Oswestry.*

J. L. D.

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In re SPENCER FLATS, LIMITED.

1936
July 27.

In re THE LAW OF PROPERTY ACT, 1925.

[1936. S. 2114.]

Covenant—Restrictive covenants—Modification—Arbitrator—Power of arbitrator to adjourn application to Court to determine questions—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 84, sub-s. 2—Law of Property (Restrictive Covenants Discharge and Modification) Rules, 1933, r. 9.

By s. 84, sub-s. 2, of the Law of Property Act, 1925: "The court shall have power on the application of any person interested—

(a) To declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; or

(b) To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom."

By r. 9 of the Law of Property (Restrictive Covenants Discharge and Modification) Rules, 1933: "If, whether before or at the hearing, it appears to the arbitrator that a question arises—

(a) as to whether or not any land is affected by the restriction; or

(b) as to what, upon the true construction of any instrument purporting to impose the restriction, is the nature and extent of the restriction thereby imposed, or as to whether the same is enforceable and, if so, by whom;

the arbitrator may require an application to be made to the court for the determination of the question in manner provided by subsection (2) of the section," (i.e., s. 84 of the Law of Property Act, 1925) "and may adjourn the case pending the hearing such question by the court."

By r. 16, sub-r. 3: "The arbitrator may by his order direct that the compensation awarded in respect of any land shall be paid into court."

A company acquired a house which was one of several subject to covenants against use (inter alia) for manufacturing, business or professional purposes, or otherwise than as a private residence, demolished it, and replaced it by a building containing flats. The owner of another of the houses, wishing to do likewise, applied for discharge of the covenants, and was granted modification of them on condition of paying compensation to the adjoining owners. Thereupon the owners of the houses adjoining the company's building threatened to bring an action on the covenants, and the company, more than a year after the beginning of its building operations, applied to an arbitrator under s. 84. The arbitrator awarded modification of the covenants on condition that the company paid 200*l.* to each adjoining owner.

On appeal by the company against the condition:—

Held, (1.) that delay by the adjoining owners in taking action did not wipe out the loss inflicted on them by the modification of the covenants, and that the condition was proper;

(2.) that the evidence disclosed no defence to an action on the covenants, and that the Court could not hold either that the adjoining owners had lost their rights on the covenants, or that the arbitrator was wrong in holding that they had not lost them.

Semble, where, on proceedings under s. 84, a question of law arises whether persons objecting to the discharge or modification of covenants have lost their right to enforce the covenants, the arbitrator ought either to require that the question be adjourned to the Court, or to adopt the alternative course of making his award conditional upon the objectors establishing their right to sue, the compensation to be paid, pending that event, into Court, under r. 16, sub-r. 3.

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APPEAL from arbitrator's award.

This was an appeal by Spencer Flats, Ltd. (hereinafter called "the appellants"), who had applied for modification, under s. 84 of the Law of Property Act, 1925, of restrictions affecting a freehold house known as 10 Spencer Park against the award, dated June 8, 1936, of an official arbitrator under the Act.

Number 10 Spencer Park was between Number 9 and Number 11. All three houses stood in gardens looking on to a centre garden, the enjoyment of which was preserved for the houses looking on to it by the device of a conveyance to trustees. The houses were subject to certain covenants, including covenants not to permit them to be used for

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manufacturing, business, or professional purposes, or otherwise than as private residences. The appellants acquired Number 10 and proceeded to pull down the existing building and build an erection of modern style so laid out as to be available for letting twelve flats. The appellants were aware of the restrictions. They acquired the property at some date in the spring of 1934 and building operations continued until September of that year.

Also abutting on Spencer Park was a house known as Number 21. The owner of that house was minded to convert it into flats, and made an application for the removal of the restrictions under s. 84. On August 31, 1935, an official arbitrator under the Act made an order for modification of the restrictions, part of the order consisting of terms that compensation be paid to the two adjoining owners. In October, 1935, the owners of Number 9 and Number 11 threatened the appellants with an action on the covenants. They did not issue a writ immediately, and on December 5, 1935, more than a year after the commencement of the appellants' building operations, the appellants applied to an official arbitrator under the Act to exercise his powers under s. 84. That application resulted in an award which was made on June 8, 1936, in the form appended to the rules made under the section. The award provided for the modification of the covenants upon a certain basis, including a condition that the two adjoining owners should be each paid 200*l.* From that award the appellants appealed, and asked the Court to say that they should not be required to pay those two sums of compensation: and the question before the Court was whether the arbitrator was right in awarding them.

H. B. Vaisey K.C. and *Miss Margaret Haskell* for the appellants. By the time that the appellants applied to the arbitrator to make an award, their flats had been completed. This is a case, not of a legal covenant, but of an equitable restriction arising under a building scheme. Had it been a legal covenant upon which an action could have been brought at law, nothing but the Statute of Limitations could have

saved the appellants from an action for damages: but the objectors, as their rights are equitable, cannot now bring any action for injury or damages, even though loss may have been suffered. They are not one penny worse off, now that the restrictions have been discharged, than they were while they were still on foot. The appellants come within the proviso in s. 84, sub-s. 1, para. (c), of the Act—namely, “that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.” The objectors stood aside and allowed the appellants to spend a great deal of money on the property. [They referred to *Leeds (Duke) v. Earl Amherst* (1) and *Northumberland (Duke) v. Bowman*. (2)] Under s. 84 it is not the amount of damage incurred through the erection of the flats, but the release of the restrictions, that must be considered. *Kelsey v. Dodd* (3) and *Sayers v. Collyer* (4) both show that if action had been brought in the present case it would have failed.

Andrew Clark for the objectors. The present case is not an action to enforce covenants, but an appeal against an arbitrator’s award, and it is wholly immaterial to that appeal to consider whether an action on the covenants by the objectors would or would not have succeeded. If it is suggested that the objectors have suffered no loss, and that there was therefore no jurisdiction to award monetary compensation, the answer is that the loss in the present case was a pure question of fact for the arbitrator to decide. If the objectors did bring an action, the appellants might show that the action was one which could never be allowed to go to trial, and that therefore the objectors had suffered no loss: but at present, the question what would have been the result if they had brought an action is quite immaterial. Further, in the present case there has in fact been no acquiescence, and there is not a shred of evidence of any acquiescence. [He referred to *Devonshire (Duke) v. Brookshaw* (5)] (see below).

H. B. Vaisey K.C. in reply.

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(1) (1846) 2 Ph. 117.

(2) (1887) 56 L. T. 773.

(3) (1881) 52 L. J. (Ch.) 34.

(4) (1884) 28 Ch. D. 103.

(5) (1899) 81 L. T. 83.

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CLAUSON J. [after stating the facts:] I think I can take it from the arbitrator's award that the arbitrator acted on the footing that the objectors were legally entitled to the benefit of the covenants. It has been argued that the objectors, having a right in equity only, have lost the right to enforce the restrictions, and that that is why they ought not to receive the compensation that has been awarded.

I ought to state, to facilitate matters in future cases, that there is machinery provided by sub-s. 2 of s. 84 of the Law of Property Act, 1925, for the Court to determine, on application, whether restrictions are enforceable and by whom: and by r. 9 of the Law of Property (Restrictive Covenants Discharge and Modification) Rules, 1933, it is provided that [his Lordship read the rule (1) and continued:] It will be observed that the rule does not make it imperative for the arbitrator to adjourn the matter to the Court: but if, on the proceeding under s. 84, a point is seriously raised which involves a question of law whether or not some of the objectors have lost the right to enforce the restrictions, the arbitrator ought to give, and, I have no doubt, would give, every facility for the raising of the question before the Court. The arbitrator is not intended to deal with questions of law. The matter might be dealt with by adjourning the arbitration so as to enable the question to be raised before the Court under s. 84, sub-s. 2. Alternatively, it might be dealt with by the very convenient procedure which has been adopted (so I am informed) in several cases of inviting the arbitrator to determine, in the first place, whether compensation is payable on the assumption that the objector has a right to the benefit of the restriction. If he is prepared to award compensation, he makes an order for payment of the compensation to the objector conditionally on his establishing his right to the benefit of the restriction, and orders the compensation to be paid into Court under r. 16, sub-r. 3. In the present case the company raised before the arbitrator the point that the objectors have lost the benefit of the restrictions by laches; but no suggestion was made that either of the

(1) See headnote.

two alternative courses should be taken, either of which would have enabled the question of the objectors' right to enforce the restrictions to be raised before the proper tribunal—namely, this Court.

On the question of compensation to the objectors as suffering loss because of the arbitrator's order, evidence was given that the selling value of the two houses had been diminished. There was no countervailing professional evidence, but when counsel addressed the arbitrator, suggestions were made that the figure was excessive. The matter was treated as a question of figures to be dealt with by the arbitrator, and the arbitrator was quite justified in holding that the objectors were claiming more than that to which they were entitled. There was plainly evidence before him which justified the award of 200*l*. It was suggested before me that there was enough evidence of acquiescence in the present case to make it necessary for the arbitrator to hold that the objectors, having regard to their conduct, had lost their right to enforce the covenants and that if, at the date of their application, they had sued on the covenants, they would have failed, because of the facts proved. It is, however, impossible for me, and was impossible for the arbitrator, to hold that the mere fact of delay made non-existent the loss, which the arbitrator held to be satisfactorily assessed at 200*l*. I do not propose to go through the authorities which have been cited. I cannot hold on the evidence in the case that the facts would have furnished an adequate defence to an action by the objectors on their covenants, and therefore it is not possible to hold that the objectors have lost their rights, or that the arbitrator was wrong in holding that the objectors have not lost their rights. I have no alternative but to dismiss the appeal. If they so choose, the appellants can abstain from paying the 200*l*., thereby losing the benefit of the award, and leaving the objectors free to bring an action on the covenants; but the appeal must be dismissed and the appellants must pay the costs.

Solicitors: *H. W. Clarkson, Wright & Co; Vivash Robinson & Co.*

K. R. A. H.

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In re A DEBTOR.

1936
Oct. 19.

[490 of 1935.]

Bankruptcy—Receiving order—Subsequent payments by debtor to solicitor for costs of appeal—Application by trustee for repayment—Practice—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 8, 37, 38.

By s. 37, sub-s. 1, of the Bankruptcy Act, 1914: "The bankruptcy of a debtor . . . shall be deemed to . . . commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, . . ."

The Court will not extend the practice of allowing a solicitor acting for a debtor to retain, as against the trustee in the bankruptcy, moneys bona fide paid by the debtor for costs of resisting the bankruptcy proceedings, so as to apply to moneys paid to him by the debtor after the date of the receiving order for costs of an appeal against it.

Dictum of Lord Esher M.R. in *In re Pollitt* [1893] 1 Q. B. 455, 458, considered.

MOTION.

By this motion the Official Receiver, as trustee of the property of a debtor, asked for an order that the respondents, who were the partners in the firm of solicitors who acted for the debtor, should, by virtue of ss. 8, 37 and 38 of the Bankruptcy Act, 1914, pay to him two sums of 25*l.* and 50*l.* paid to them by the debtor on July 29 and October 9, 1935, respectively, on the ground that they were moneys of the debtor which on adjudication formed part of her property divisible among her creditors. He asked also, on the same ground, for an order that so much of a sum of 50*l.*, which had been paid to the respondents by the debtor on May 3, 1935, as was not required for her expenses in opposing the bankruptcy proceedings up to the date of the receiving order, should be paid over to him. That sum had been paid by the debtor to the respondents, before the date of the receiving order, for those expenses, and the sum of 25*l.* and the other sum of 50*l.* had been paid by her to them after that date for the expenses of an appeal against the receiving order, the primary purpose of the 25*l.* being to provide the 20*l.* security

which a debtor must lodge as a condition of appealing against a receiving order. CLAUSON
J.

The respondents contended that they ought to be allowed to keep all the moneys, even though two of the sums had been paid to them after the date of the receiving order and strictly belonged to the applicant, on the ground that it was the practice of the Court to permit a debtor's trustee to allow the debtor's solicitor to retain money paid by the debtor to him and properly expended in resisting the bankruptcy proceedings, and that the debtor ought to be allowed to take all reasonable steps in so doing. 1936
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Tindale Davis for the applicant. Be it conceded that these moneys belonged to the debtor and were paid by her to the respondents, as her solicitors, for purposes connected with the bankruptcy: the question still arises whether they can be retained against the applicant, to whom they belong.

It has been held that a trustee in bankruptcy cannot recover money which a debtor has bona fide paid to his solicitor to resist the bankruptcy proceedings: *In re Sinclair*. (1) The Court, however, will not go further than that: and that is what it is being asked to do here, for the respondents are seeking to retain moneys paid to them in contemplation of an appeal. In *In re Pollitt* (2) and *In re Spackman* (3), *In re Sinclair* (1) was questioned. *In re Johnson* (4) does not go as far as *In re Sinclair* (1), but is the only reported case relying on *In re Sinclair* (1) as authority for the order made.

In re Sinclair (1) is the only case dealing with the point in an informative manner. Under the Act, all assets vested in the debtor at the commencement of his bankruptcy pass to his trustee. Persons dealing with him before, or without knowledge of, his act of bankruptcy, are protected by s. 45 of the Act.

Gerald Gardiner for the respondents. This is a point of obvious practical interest to all solicitors. Merely as a practical measure the Court has granted a concession which

(1) (1885) 15 Q. B. D. 616.

(3) (1890) 7 Mor. 100.

(2) [1893] 1 Q. B. 455.

(4) (1914) 111 L. T. 165.

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In re Sinclair (1) has expressly applied to solicitors who give their services: that concession does not in any way depend on whether the money was paid before or after the receiving order.

Although, in strict law, the moneys in issue in the present case belong to the applicant, the principle which should be applied is that a person faced with the prospect of bankruptcy ought to have an opportunity to take reasonable steps to avoid it.

CLAUSON J. [after stating the facts:] It is certainly remarkable that if this application does not succeed and if the respondents are held entitled to retain the sums which were paid to them after the receiving order, the effect will be that the Court will sanction security for the costs of an appeal being lodged by the debtor out of the fund which would necessarily, in view of the receiving order having been made, unless the receiving order is upset, be moneys of the applicant.

With regard to the defence of the debtor against bankruptcy proceedings, it has long been a settled practice of the Court to approve of the trustee permitting the solicitors to whom the debtor has paid a sum as against their charges in the proceedings to retain so much of that sum as has been properly disbursed or allocated for the purpose for which it was paid. It is not easy, on the Act as it stands, to appreciate the justification for the practice; but the practice is well settled and it has been accounted for by Lord Esher M.R. when presiding in the Court of Appeal in the case of *In re Pollitt* (2) as being due to the Court's consideration for the dictates of humanity. The question I have to determine is whether this practice (which I do not for one moment suggest should be departed from) is to be extended so as to apply to the costs of supporting an appeal which ex hypothesi is unsuccessful. I do not see my way to extend the practice. In my judgment this appeal must succeed and there must be an order for repayment of the 25*l.* and 50*l.* paid after the receiving order. With regard to the 50*l.* paid before the

(1) 15 Q. B. D. 616.

(2) [1893] 1 Q. B. 455, 458.

receiving order, there must be an order for repayment of the balance over and above the costs properly incurred by the respondents in opposition to the bankruptcy proceedings up to the receiving order.

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Solicitors: *Tarry, Sherlock & King; Wilkinson, Bowen, Haslip & Jackson.*

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Nov. 2, 3.

In re MAINWARING.MAINWARING *v.* VERDEN.

[1935. M. 3803.]

Mortgage—Conveyance of part of mortgaged property subject to mortgage—Part of mortgaged property retained—Liability of purchaser to contribute.

A vendor conveyed to two purchasers certain interests in land. The conveyance was expressed to be subject to a mortgage. The vendor retained a policy of assurance which was also subject to the charge created by the same mortgage:—

Held, by the Court of Appeal (varying the order of Bennett J.), that, as between the purchaser and the vendor, there was a right of contribution between the two properties.

In re Darby's Estate [1907] 2 Ch. 465 and *In re Best* [1924] 1 Ch. 42 considered.

ADJOURNED SUMMONS.

Sir Harry Stapleton Mainwaring was entitled under two settlements, one of which was referred to as the Peover Hall Settlement, to a life interest in the settled property and to an interest in a reversion.

On December 23, 1930, he effected a mortgage with the Legal and General Assurance Co. to secure the sum of 5500*l.*, which was charged on his interests under the Peover Hall Settlement. The mortgage debt was also charged on a life policy for 6000*l.*

On July 1, 1931, Sir H. Stapleton Mainwaring was adjudicated bankrupt, and on April 29, 1932, his trustee in bankruptcy conveyed to two purchasers his interests under the two settlements. By the conveyance the property was expressed to be conveyed subject to the incumbrances mentioned in the second schedule thereto, one of these incumbrances being the mortgage of December 23, 1930. Sir H. Stapleton Mainwaring died on December 30, 1934. The policy then fell in and the money was applied in payment off of the mortgage.

The trustee in bankruptcy took out a summons for the

purpose of ascertaining how the mortgage debt was to be borne, having regard to the conveyance and to the fact that he had retained the interest of Sir H. Stapleton Mainwaring in the policy of assurance.

Bennett J. said that on the authority of *In re Darby's Estate* (1) the borrower had no right of indemnity, the position of the borrower being an exception, as stated by Warrington J., to the general rule. The law was stated accurately in Fisher and Lightwood's *Law of Mortgage*, 7th ed., p. 569, as follows : " If the mortgagor, being personally liable, assigns one estate, X, and retains the other, Y, X is no longer treated as equally liable with Y to bear the debt. The duty of the mortgagor to discharge his own personal liability makes the estate in his hands the primary fund for payment : and so, too, where it has come to the hands of his personal representatives. Hence, if he or his personal representatives have paid the debt, there is no equity to compel contribution from X." That statement of the law seemed to him to summarize accurately the decision of Warrington J. in *In re Darby's Estate* (1) and to cover the case.

The plaintiff appealed.

J. M. Gover K.C. and *L. W. Byrne* for the appellant. The question is as to the effect of the property being expressly assigned subject to the mortgage. They referred to *In re Darby's Estate* (1) ; *In re Jones* (2) ; and *In re Best*. (3) *In re Best* (3) is distinguishable from the present case owing to the fact that in the former case there was no reference to the property being conveyed subject to the mortgage. If this is not a case of indemnity it is a case of contribution. That would be made according to the value at the time when the debt was paid, i.e., the death of the bankrupt.

E. M. Winterbotham for the trustees of the settlements.

Fergus Morton K.C. and *F. McMullan* for the other respondents. The question is whether the purchasers must pay any part of the mortgage debt, i.e., whether it should

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(1) [1907] 2 Ch. 465.

(2) [1893] 2 Ch. 461.

(3) [1924] 1 Ch. 42.

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be apportioned between the two properties. There is no apportionment at all. The plaintiff, having had the debt of Sir H. Stapleton Mainwaring paid off, comes to the purchasers requiring them to pay a proportion of the debt. The retention of the policy by the plaintiff clearly shows that his intention was to retain it to cover the capital sum due under the mortgage, the amount of the policy money being more than sufficient for that purpose.

They referred to *Waring v. Ward*. (1) In *In re Best* (2) Tomlin J. took the view that Warrington J. in *In re Darby's Estate* (3) followed the principle that if a debt is a debt of the assignor, he has not the right to claim payment of a proportion of the debt from some other person.

In *In re Darby's Estate* (3) the conveyance was not expressed to be subject to the mortgage. In the present case it was so expressed. They referred to Fisher and Lightwood's Law of Mortgage, 7th ed., p. 567.

The burden is on the plaintiff to establish that by some contractual obligation the purchasers are liable to contribute something.

J. M. Gover K.C. in reply. There is no authority suggesting that where a mortgagor has sold part of his property he must exonerate the assignee from complete liability. In such a case he is entitled himself to complete exoneration. If that contention is wrong, then, on the authority of *In re Darby's Estate* (3) the salient fact which distinguishes cases like the present case from the other cases is that here the property was conveyed subject to the mortgage.

LORD WRIGHT M.R. This is an appeal from a judgment of Bennett J. dealing with a question raised on an originating summons. The parties to the proceedings are, on the one side, the trustee of the property of Sir Harry Stapleton Mainwaring, a bankrupt, now deceased, and, on the other side, one set of defendants who are the beneficiaries of the purchasers of certain property which passed to them under the deed of conveyance, to which I shall refer in a moment. The

(1) (1800) 5 Ves. 670.

(2) [1924] 1 Ch. 42.

(3) [1907] 2 Ch. 465.

other defendants are the actual purchasers, and the widow and the two daughters of the deceased who have certain beneficial interests, or may have certain beneficial interests, in the matter.

The question stated in the originating summons in somewhat complex terms may be stated more simply to be whether, as between two properties, the charge on both made by the original owner by way of mortgage for the same mortgage debt is to be borne, after a sale or division of ownership, by the one exclusively or, failing that, is to be borne in rateable proportions between the two properties both originally chargeable for the same debt. That involves a short statement of the facts of the case.

I shall not deal in detail with the suggestion that the whole of the debt should be borne by the property conveyed, because I do not gather that Mr. Gover has contended for that point very strongly, and I do not think it could possibly succeed. The material question is whether there is contribution between the two properties. I shall disregard a small further mortgage.

The deceased baronet was entitled to a life interest in certain property referred to as the Peover Hall Estate. That had originally been freehold property, but at a time before the particular questions here involved arose it became converted into investments which represent and take the place of the freehold hereditaments. Under the settlement the deceased baronet was entitled to a life interest subject to certain rent charges. On his death there was a remainder to the use of his son, subject again during the lifetime of the widow to a life interest of hers. On her death or re-marriage the property was to pass to the son or sons of the deceased baronet. That is immaterial because he died leaving no sons. Then on the failure of these limitations the property was to pass in fee simple to the use of the deceased baronet. There was another settlement called the Outlying Lands Settlement, in which the baronet was also interested, in not identical but somewhat similar terms. I need not discuss that in detail because it does not come into question on this application.

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Now the debtor, Sir Harry Stapleton Mainwaring, was made bankrupt on July 1, 1931. Before that date he had effected a mortgage with the Legal and General Assurance Co. for 5500*l.*, which was charged on his interests in the Peover Estate ; that is to say, on his life interest, and on his remainder in fee simple, on the failure of the intervening limitations. The mortgage was also secured on a life policy for 6000*l.* which had been effected some years before on his life. I pass over the small second mortgage on the same property of March, 1931. After his adjudication in bankruptcy the trustee in bankruptcy sold his interests in the Peover Estate for the sum of 2000*l.* to the first two defendants. The second schedule to the conveyance refers to the mortgage to secure the sum of 5500*l.* with interest, and a further small mortgage, and it also mentions the covering policy, as it is called, for 6000*l.* The conveyance, after setting out the subject-matter of the transfer in full, states that the purchasers are to hold, subject to the duties payable on the death of Sir Harry Stapleton Mainwaring, or to any duty payable upon the death of the widow, and "subject as to all the premises so far as respectively affected thereby to the incumbrances mentioned in the second schedule hereto"; that is to say, for the purposes of this proceeding, that it is subject to the mortgage on the debtor's interests. It also refers to the policy which is not the subject of the sale and which stands outside the matter altogether.

Under these circumstances the trustee has brought these proceedings to have it declared on what property or properties the discharge of the mortgage must fall.

The question has been discussed in certain cases to which we have been referred, whether and under what circumstances it is right in a case of this character that there should be, if not an indemnity, which I do not discuss further, at least a contribution made between the properties respectively charged for the same debt. The first of these cases to which I need refer, and I am only going to refer to two, is a decision of Warrington J. in *In re Darby's Estate*. (1) There was there

a deed of charge and memorandum of deposit executed by an assignor on certain leasehold premises, together with a policy of insurance on his own life, and certain other properties. The assignor subsequently by a voluntary deed assigned the leasehold premises to his wife. The deed contained no reference to the charge and memorandum of deposit, and no covenants for title express or implied. On the death of the assignor his executors paid off the debt due to the bank, and applied to the Court to determine whether the widow, as assignee of the leaseholds, was liable to contribute to the payment of the debt. Various points were taken. It was said, among other things, that the assignment was purely voluntary. It was further said that there was no covenant against incumbrances. The learned judge, however, decided the case in favour of the widow. He pointed out that the debt in question was the debt of the assignor, which he and his executors were personally bound to pay. The position, he said, would have been different if the debt had been what is called a paramount incumbrance, that is one which had been charged on the property before it came to the assignor, and he held, in accordance with the various authorities, that where the debt in question is the personal debt of the debtor himself, *prima facie* that debt is to be paid entirely out of the assets of the assignor, and there is no claim to a contribution in respect of property which has been assigned even to a volunteer. But the learned judge was careful to point out that the position in equity would or might have been different if the property had been assigned subject to the debt. He held, however, on the facts of that case, that there being no such term in the assignment, the debt had to be discharged *in toto* by the executors out of the property of the deceased man without any right of contribution from the other property which was being charged. He treated such a case as an exception to the *prima facie* equity of contribution.

In a later case, *In re Best* (1), it was held again by Tomlin J. that there was no right of contribution there. The learned judge in his judgment does not refer in terms to the question

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of whether or not the assignment was made subject to any charge. He said: "Prima facie equality or the imposition of proportionate burdens on different properties charged with a debt is equity, but there may be circumstances which disturb the prima facie distribution of the burden and throw it wholly on one person," and he followed and referred to the case of *In re Darby's Estate*. (1) I notice, however, in the headnote, that it is specifically stated that the deed of assignment contained no reference to the mortgage, and that counsel for the widow, who was opposing the claim to a contribution, put in the forefront of his argument that "the policies having been assigned to the widow not subject to the mortgage, the widow is entitled to be recouped the amount deducted from the policy moneys in respect of the debt."

In this case the conveyance expressly makes the sale subject to the mortgage. That I think is the essential point to consider in a case like this. It is perfectly true that the debt was a personal debt of the assignor, and that the sale which was made was a sale for value, and that the assignor retained part of the property mortgaged. But I think all these considerations are outweighed by the fact that the sale was in terms a sale of an incumbered property and that the purchasers took it on that footing.

Mr. Fergus Morton contended that the reference to the policy and certain other points in the conveyance carried with it the necessary implication that there was to be no contribution as between the two properties. But I do not think he is right in that, and I think this is a case in which with all respect to the learned judge it should be declared that there is a right of contribution between the two properties, and that to that extent the appeal should succeed. The full terms of the order will be as stated by Romer L.J.

ROMER L.J. By the notice of appeal the plaintiff asks for a declaration that the sums due on the two mortgages, which are referred to in para. 3 of the Originating Summons, ought to be borne either exclusively by the properties

mortgaged, other than the policy of insurance, or rateably, according to the respective values of the two properties.

Now the first alternative is obviously based upon the following proposition, that where a mortgagor mortgages his property to secure a loan to himself and subsequently assigns part of that property to a purchaser subject to the mortgage, there is an equity arising between him and the assignee under which the assignee becomes liable to indemnify the assignor against the whole of the mortgage debt. I venture to think that a more astonishing proposition than that was never advanced in a court of equity. It purports to be based upon a dictum of Lord Eldon which is found in the case of *Waring v. Ward* (1). There Lord Eldon said this in reference to the purchase of an equity of redemption: "The party"—he means by "the party" the purchaser—"means at the time of the contract to buy the estate subject to that mortgage; in relation to which mortgage the personal contract was entered into,"—that is, of course, by the mortgagor—"and that was not his. If he enters into no obligation with the party, from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."

It is apparent from that passage that Lord Eldon is dealing with a case where the whole of the mortgaged property is sold subject to the mortgage. Where on the other hand a mortgagor, having created the mortgage debt, sells the whole of the property, but does not sell it subject to the mortgage, so far from the assignee being bound to indemnify the assignor, the assignor is bound to indemnify the assignee. It was so held by Tomlin J. in *In re Best*. (2) The learned judge did not in terms refer to the fact that the assignment

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(1) (1802) 7 Ves. 332, 337.

(2) [1924] 1 Ch. 42.

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was not made subject to the mortgage, but that matter, of course, was in his mind. It is mentioned in the headnote, and it was relied upon by Mr. Wilfrid Hunt in his argument on behalf of the assignee.

In the present case we are not dealing with a sale of the whole of the mortgaged property, which was the only matter with which Lord Eldon was dealing in his dictum; we are dealing with a case where the assignment made to a purchaser is of part only of the mortgaged property, and the remainder of the property was to be retained by the assignor. In such a case as that the prima facie rule is that the mortgage debt as between assignor and assignee shall be borne rateably in proportion to the respective values of the items of the mortgaged property. As Tomlin J. said in his judgment in *In re Best* (1), to which I have just referred, "prima facie equality or the imposition of proportionate burdens on different properties charged with a debt is equity, but there may be circumstances which disturb the prima facie distribution of the burden and throw it wholly on one person."

Now the circumstances in which that rule is disturbed, that is to say circumstances which constitute an exception to that general rule, are these: Where the debt is one created by the assignor himself, and where no intention is shown that the assignee shall take the property assigned to him subject to the mortgage, the assignor must indemnify the assignee against the debt. That was laid down in the case to which the Master of the Rolls has already referred, the case of *In re Darby's Estate*. (2) There Warrington J. was dealing with a case where there were two items of property subjected by the mortgagor to the same debt, the debt being a debt of the mortgagor's own, and where the mortgagor subsequently had assigned one of the mortgaged properties to his widow without any reference to the mortgage debt at all. Warrington J. said this (3): "The case I have here to deal with is the exception,"—he had been stating the law more or less as I endeavoured to state it just now

(1) [1924] 1 Ch. 42, 44.

(2) [1907] 2 Ch. 465.

(3) Ibid. 470.

and is dealing with what I call the exception—"How can it be said that the assignee under this deed, whether it be voluntary or not, is liable to contribute to the debt of the assignor? The assignor owed a sum of money charged on certain property. What equity would he have had in his lifetime to call upon an assignee from him to pay any part of that debt? I can see none, unless he assigned the property subject to the debt." In the present case, although the debt was created by the person through whom the trustee in bankruptcy claims—the trustee in bankruptcy stands in no better position than the bankrupt—yet the assignment was made expressly subject to the mortgage. The case is not brought within the exception to which I have referred, and to which Warrington J. referred, and therefore the *prima facie* rule of equity will apply, that is to say, the two mortgage debts must be apportioned between the property assigned and the property retained in the proportion to their respective values.

Mr. Fergus Morton asked us to say that, looking at the deed of assignment and the surrounding circumstances, we ought to arrive at the conclusion that the arrangement between the parties was this, that the interest on the mortgage debts and the premium on the policy should, during the remainder of the life of the bankrupt, be borne by the assignees, and in exoneration of the policy retained by the assignor, but that the principal sum should be borne exclusively by the policy of insurance. All I can say with reference to that is that that might have been a very wise and a very proper arrangement for the parties to have made, but for myself I can see no evidence in the deed or in the surrounding circumstances that such an arrangement ever was in fact made. The result of it is that, in my judgment, the order of Bennett J. must be varied, and a declaration must be made that the two mortgage debts, with principal, interest, and the mortgagee's costs, must be borne by the two properties rateably according to their values at, I imagine, the date when the bankrupt died; because it was on that date that the insurance company, the

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mortgagees, received, or must be deemed to have received, the policy moneys, and must be deemed to have paid themselves the first mortgage debt. So far as regards the second mortgage debt, I suppose there may have to be added some later interest to the principal sum, that is to say, interest after the death of the bankrupt, because the balance of the insurance money was retained in the hands of the insurance company, pending, no doubt, a decision upon this summons.

GREENE L.J. I agree. When the true meaning of the conveyance of April 29, 1932, is understood in connection with the relevant circumstances of the case, it appears to me quite impossible to accept either of the extreme views which have been put before us.

The essential facts in the case are these: the vendor was entitled to two properties subject to one mortgage. He sells one of them, and in the conveyance that sale is expressed to be subject to the mortgage. No reference is made to what is to happen, as between the parties to that deed, to the property retained by the vendor in relation to the mortgage. Now, taking that document by itself, what does it mean? It means, I should have thought, this, that the property which is being bought is to remain, after the conveyance, subject to the mortgage as it was before the conveyance, but there is nothing in the document to disturb the position with regard to the property retained. It appears to me that when the matter is looked at in that way it becomes quite impossible to accept the view urged by Mr. Gover that, under the principle enunciated by Lord Eldon in *Waring v. Ward* (1), he is entitled to throw the whole of this burden upon the assignee. Once it is appreciated that the moment before this document was executed both properties were subject to the mortgage, and that when it was executed the two properties fell into different hands without any provision being made for exonerating the property retained, but it was provided in terms that the property taken is to remain subject to the mortgage, it

appears to me that, so far from an equity arising which would result in throwing the whole of the burden upon the purchaser, the equity remains an equity to apportion the burden of the mortgage as between the two properties.

That brings me to the opposite contention put forward by Mr. Fergus Morton. Accepting the rule that contribution *prima facie* takes place, he points out that there is an exception to that rule where the vendor himself of one of the two mortgaged properties is the person who is under the personal obligation to pay the debt to the mortgagee. In the present case, of course, the trustee in bankruptcy, so far as that is concerned, stands in no better position than did the bankrupt. Mr. Fergus Morton says that where the property retained, which was subject to the mortgage, is still in the hands of the mortgagor himself, then the exception applies, and the mortgagor should be compelled to bear the whole of the burden.

Now here again, when this transaction is appreciated and the language used by the parties is understood, it appears to me that that contention cannot be supported. What do the parties mean when they say that the purchaser is to take the property assigned subject to the mortgage? That is not the proper way to express an intention that as between the two properties the property assigned is to be deemed to be free from the mortgage with a consequent indemnity by the assignor. The result of the language used appears to me to be totally different, and the authority which was referred to of *In re Darby's Estate*, (1) brings out, in my judgment, the distinction quite clearly. In a case where an assignee of one property takes that property without reference in the document to its being subject to the mortgage, in a case where the vendor or assignor enters into a covenant for further assurance, and in cases of that kind, it would appear as a matter of construction of the document that the intention of the parties was that the ordinary rule of contribution should be excluded; but where, on the other hand, the document itself says that the assignee is to take the property subject to the mortgage, it appears to me impossible to read any such intention

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into their minds. So far as the application of the equitable rule is concerned, in my opinion the rule applicable here is the rule of contribution. That is the rule. The other is the exception. The exception, in my opinion, only applies in cases where, either from the language used or from the circumstances of the case, it is possible for the Court to say that it is either inequitable or against the presumed intention of the parties that the rule should apply. Here I find no language used and nothing in the circumstances to displace the rule. On the contrary, it appears to me that the circumstances and the language all point to its being not merely equitable but the intention of the parties that the rule should prevail. It is perfectly true that more careful conveyancing might have put in some express provision dealing with the event which has happened, but in the absence of such express provision it appears to me that the matter has been left by the parties in such a form that the rule prevails. That appears to me to be in accordance with good sense and fairness, because a person who is buying one of two mortgaged properties, and is told nothing more than that he is buying his property subject to the mortgage, would reasonably assume, it seems to me, that as between himself and the vendor the mortgage is to continue as a mortgage on the two properties.

Solicitors : *Tarry, Sherlock & King ; Gilbert Samuel & Co. ; T. D. Jones & Co.*

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Charity—Will—Gift of share of residue to institution not necessarily charitable—Included in gift of residue to charitable institutions with kindred objects—Treasurer's receipt in each case a good discharge—No institution satisfying description in will—General charitable intention—Scheme.

By her will a testatrix gave her residuary personal estate to the Berwick-upon-Tweed Infirmary, the Newcastle-upon-Tyne Infirmary, the Newcastle-upon-Tyne Nursing Home, and Doctor Barnardo's Homes, London, in equal shares; and she directed that the receipt of the treasurer for the time being of the aforesaid institutions should be a sufficient discharge to her executor for payment of the aforesaid legacies.

No institution having been found which correctly answered the description of the "Newcastle-upon-Tyne Nursing Home," and doubts having arisen as to how the gift of this one-quarter share of residue should be disposed of, an originating summons was taken out by the executor of the will for the purpose of determining (inter alia) the question whether certain of the defendants (being institutions which seemed most nearly to correspond to the particular institution referred to in the will), namely, the Northumberland County Nursing Association, the Newcastle Private Hospital and Nurses' Home (a private nurses' home whereof two of the defendants, A. M. F. and S. L. P., were proprietors), the Cathedral Nursing Society for the Sick Poor of Newcastle-upon-Tyne (of which another defendant, F. C. C., was treasurer) or any other body, society or institution was entitled to the particular one-fourth share in the residuary personal estate of the testatrix in question, or whether such share devolved as upon an intestacy.—

Held, (1.) That no society or body existed which satisfied the Court that it was the society or body meant and intended by the description "The Newcastle-upon-Tyne Nursing Home," but (2.) that although the objects of a nursing home are not necessarily charitable, the fact that the testatrix was dealing with the residue of her estate in equal shares, that the other three named residuary legatees were charities having kindred objects, and that there was a direction in the will that the receipt of the treasurer for the time being of each institution was to be a sufficient discharge showed a general charitable intention in the will, that there was sufficient context to prevent a lapse of the particular share in question and therefore no intestacy. A scheme for administering the one-quarter share *cy-près* could therefore be properly carried out.

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By her will dated July 21, 1920, Dorothy Ann Knox, spinster (hereinafter called "the testatrix"), after appointing the plaintiff Joseph Fleming sole executor of her will and directing him to pay her just debts and funeral and testamentary expenses, and after giving certain legacies therein mentioned free of duty, gave the residue of her personal estate in the following terms: "I give and bequeath all the rest residue and remainder of my personal estate to the Berwick-upon-Tweed Infirmary The Newcastle-upon-Tyne Infirmary The Newcastle-upon-Tyne Nursing Home and Dr. Barnardo's Homes London in equal shares I direct that the receipt of the treasurer for the time being of the aforesaid institutions shall be a sufficient discharge to my executor for payment of the aforesaid legacies." The testatrix made a codicil dated June 24, 1929, to her said will which did not affect the gift of residue therein contained and died on February 24, 1931. Her said will and codicil were duly proved on May 1, 1931, by the plaintiff in the Newcastle-upon-Tyne District Probate Registry.

After the death of the testatrix endeavours were made to discover any institution which might answer the description in the residuary bequest in the will of "the Newcastle-upon-Tyne Nursing Home," but without success, none being found of that particular name. Various nursing institutions and societies were, as a result of inquiry, found to exist in and around Newcastle and in the county of Northumberland generally, any one of which might or might not correspond to the one mentioned in the will and be considered as the nursing home intended by the testatrix. Owing, however, to the doubt which existed as to which of these particular institutions was the one likely to be meant, an originating summons was taken out by the plaintiff as sole executor of the will for the determination (inter alia) of the following question—Whether the defendants the Northumberland County Nursing Association or the Newcastle Private Hospital and Nurses' Home (whereof the defendants Alice M. Flick and Sarah L. Peart were the proprietors) or the Cathedral Nursing

Society for the Sick Poor of Newcastle-upon-Tyne (of which the defendant Francis C. Clayton was treasurer) or any other body, society or institution was entitled to the share in the residuary personal estate of the testatrix given by her said will to the "Newcastle-upon-Tyne Nursing Home" in the said will referred to or whether such share devolved as upon an intestacy. The defendants J. W. Carmichael and F. C. Clayton were the respective treasurers of the Berwick-upon-Tweed Infirmary and the Newcastle-upon-Tyne Infirmary. Another defendant was Dr. Barnardo's Homes, National Incorporated Association, all these three institutions being mentioned in the will and therefore interested in the testatrix's residuary personal estate.

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When the matter came before the Court the learned judge held after hearing the affidavit evidence that no society or body existed which satisfied him that it was the one meant and intended by the testatrix to answer the description "Newcastle-upon-Tyne Nursing Home".

F. H. L. Errington for the applicant.

L. F. Potts for the defendant J. W. Carmichael, treasurer of the Berwick-upon-Tweed Infirmary.

C. Montgomery White for the defendant F. C. Clayton, treasurer of the Newcastle-upon-Tyne Infirmary, and also treasurer of the Cathedral Nursing Society for the Sick Poor of Newcastle-upon-Tyne.

F. Baden Fuller for Dr. Barnardo's Home, National Incorporated Association.

Fergus Morton K.C. and *J. A. Brightman* for the defendants Miss A. M. Flick and Miss S. L. Peart (proprietors of the Newcastle Private Hospital and Nurses' Home).

H. B. Vaisey K.C. and *W. Stuart Norwood* for the Northumberland County Nursing Association.

C. R. R. Romer for Miss I. R. Cunningham, the only next-of-kin of the testatrix. There is no room here for the application of the *cy-près* doctrine. The name does not necessarily indicate a charity; nursing homes are frequently carried on for gain. He referred to *In re Davis*, *Hannen v. Hillyer*. (1)

(1) [1902] 1 Ch. 876.

LUXMOORE J. It is submitted that this gift lapses and there is an intestacy.

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A. Andrewes Uthwatt for the Attorney-General. The whole will shows a general charitable intention. The testatrix has used the word "institutions"; and has made (1.) a gift of residue, (2.) the gift is one of a chain of admittedly charitable legacies, and (3.) she has directed that the receipt of the treasurer should be a sufficient discharge. It is a case where the *cy-près* doctrine should be applied.

LUXMOORE J. I have already held that there is no society or body which is able to satisfy the Court that it is the society or body meant and intended by the description "the Newcastle-upon-Tyne Nursing Home." The question therefore arises whether the testatrix has shown by her will a sufficient charitable intention to enable the share to be administered *cy-près*.

In all cases where there is a gift to some body or institution which has never existed, the question whether there is a charitable intention or not is always a matter of construction of the particular will which has to be considered. It is quite true that in the present case the "Newcastle-upon-Tyne Nursing Home" by itself is not a title which necessarily denotes charity or anything of that kind, but it is very important in considering the construction of the will and considering whether there is a general charitable intention to be found or not, to consider the actual collocation in which the named institution is to be found.

The will in this case is a short one. It begins with the appointment of an executor. There are a number of pecuniary legacies which are directed to be paid free of duty, and then there is a bequest of "all the rest residue and remainder of my personal estate," and the named beneficiaries are "the Berwick-upon-Tweed Infirmary, the Newcastle-upon-Tyne Infirmary, the Newcastle-upon-Tyne Nursing Home, and Dr. Barnardo's Homes, London, in equal shares." Pausing there for a moment, there is no question whatever but that the Berwick-upon-Tweed Infirmary, the Newcastle-upon-Tyne Infirmary and Dr. Barnardo's Homes

are charities within the strict meaning of the term. The institution to which the testatrix intended to refer as the Newcastle-upon-Tyne Nursing Home might or might not be a charity, so far as its name is concerned; but when you find that the gift is a gift of residue, that the object of each of the other charities is a kindred object to that which might be inferred from the name of the other residuary legatee, I think you get considerable assistance with regard to the testatrix's intention. The gift itself is followed by a direction that "the receipt of the treasurer for the time being of the aforesaid institution shall be a sufficient discharge to my executor for payment of the aforesaid legacies." As I have said, of course a nursing home may or may not be a charity, but I think it appears fairly plain from this will that the kind of nursing home that the testatrix had in mind was one which would be carried on as an institution with a treasurer and in the same sort of manner, and for the same sort of purposes, as the other named legatees carry on their particular institutions. The other institutions are the Berwick-upon-Tweed Infirmary and the Newcastle-upon-Tyne Infirmary, and I think it is not very difficult to see that the Newcastle-upon-Tyne Nursing Home which the testatrix is intending to benefit was to be an institution which carried on a similar kind of work to that carried on by the first two named charities. As I said, the fact that the testatrix is dealing with the residue of her estate, that she is dividing it into equal shares, that three of the named beneficiaries are undoubtedly charities, and that the testatrix directs that each share is to be received by the treasurer of an institution, are themselves sufficient to establish as a matter of construction of this will that the testatrix, in disposing of her residue, had a general charitable intention in mind and was not thinking only of the particular institutions or persons who were to receive her bounty.

In my judgment there is sufficient context in this will to prevent a lapse of the quarter share of residue given to the Newcastle-upon-Tyne Nursing Home, and there is therefore no intestacy. In all the circumstances of the case, having

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LUXMOORE regard to the construction of the will, I hold that there is
 J. a general charitable intention. In the circumstances it will
 1936 be necessary to direct a scheme to be approved dealing with
 KNOX, this particular share of residue.
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FLEMING The necessary evidence being before the Court, his Lordship
 v. directed a scheme whereby the one-quarter share expressed
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 ——— should be administered cy-près, and should be divided into
 two equal moieties between the Northumberland County
 Nursing Association and the Cathedral Nursing Society for
 the Sick Poor of Newcastle-upon-Tyne.

Solicitors : *Collyer-Bristow & Co., for James Gray, Berwick-upon-Tweed ; King, Wigg & Brightman, for Clayton & Gibson, Newcastle-upon-Tyne ; H. B. Nisbet & Co. ; King, Wigg & Brightman, for Keenlyside & Forster, Newcastle-upon-Tyne ; Grundy, Izod & Co., for William Webb & Son, Morpeth ; Solicitor to the Treasury.*

A. R. T.

In re R. GERTZENSTEIN, LIMITED.BENNETT
J.

[00486 of 1936.]

1936
Oct. 28.

Company—Voluntary Liquidation—Solicitor liquidator—Profit costs in proceedings brought by himself and co-liquidator in course of the winding up—Companies (Winding Up) Rules, 1929, St. R. & O., 1929, No. 612/L. 16, r. 158.

There is a fiduciary relationship between the liquidator on the one side and the shareholders or creditors of the company on the other. He therefore cannot receive remuneration beyond what is allowed by statute or the Rules even though, being a solicitor, he conducts proceedings on behalf of himself and his co-liquidator in the process of winding up. The exception in *Cradock v. Piper* (1850) 1 Mac. & G. 664 is excluded by the wide and absolute terms of r. 158 of the Companies (Winding Up) Rules, 1929. (1)

ADJOURNED SUMMONS.

This was an application by the two liquidators of a company, R. Gertzenstein, Ltd., to review the taxation of a bill of costs which were ordered to be taxed under an order of the Court dated February 26, 1936. The company went into voluntary liquidation on January 10, 1933. Two liquidators were appointed, one a chartered accountant and the other, Mr. Herbert Baron, a solicitor. In the course of the winding up they took out an originating summons against the respondents impeaching certain transactions between the company and other persons on the ground of fraudulent preference. In those proceedings Mr. Baron acted as solicitor for himself and his co-liquidator. The matter was compromised; the respondents to the summons, undertaking not to prove or make any claim in the

(1) The Companies (Winding Up) Rules, 1929, r. 158, reads: "Except as provided by the Act or the Rules, a liquidator shall not under any circumstances whatever, make any arrangement for, or accept from any solicitor, auctioneer, or any other person connected with the company of which he is liquidator, or who is employed in or in connection with

the winding-up of the company, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration to which under the Act and the Rules he is entitled as liquidator, nor shall he make any arrangement for giving up, or give up any part of such remuneration to any such solicitor, auctioneer, or other person."

BENNETT liquidation of the company, were by consent ordered to pay a sum of money to the joint liquidators in settlement of their claim and to pay to them their costs, such costs to be taxed.

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The costs which were brought in for taxation included Mr. Baron's profit costs, and these were disallowed by the Taxing Master. Objections were carried to the Registrar, who disallowed the profit costs and overruled the objections. From that order the joint liquidators appealed to the Court.

Cyril Radcliffe K.C., Sir George Jones and C. F. J. Baron for the applicants. The liquidator is in the position of a trustee, and therefore the rule in *Cradock v. Piper* (1) is applicable to the present case. We are only asking for a proper reward. Rule 158 does not apply. That rule is directed to the particular case of profit sharing. There must be some arrangement between the liquidator and some one else employed in the winding up by which the liquidator is to benefit. In the present case with whom is there an arrangement? The profit costs are paid on account of a separate duty performed by the liquidator.

Humphrey H. King for some of the creditors. The basis of my learned friend's argument is that r. 158 is directed against profit sharing. In my submission the rule excludes the exception to the general rule in *Cradock v. Piper*. (1) In a compulsory liquidation remuneration is on a percentage basis : in a voluntary liquidation, by arrangement. The question turns on the interpretation of r. 158, and there are no grounds for limiting its very wide terms.

Cyril Radcliffe K.C. in reply.

BENNETT J. [stated the facts and continued :] The ground for overruling the objection was that r. 158 of the Companies (Winding Up) Rules, 1929, precluded Mr. Baron from charging profit costs, and the learned Registrar disallowed them. The case seems to stand in this way. There is between the joint liquidators on the one side and the shareholders or creditors of the company on the other a fiduciary relationship which

prevents the liquidators making a profit out of their trust. That fiduciary relationship would prevent a liquidator who is a solicitor from getting ordinary profit costs of non-litigious legal business done by him as solicitor. To that general rule there is an exception, the exception established by the decision in *Cradock v. Piper* (1), and that is where a solicitor-trustee acts as solicitor for himself and his co-trustees. It is established that in those circumstances the solicitor-trustee can get his profit costs out of the trust. The applicant says that the exception to the general rule applies and there is nothing in the Companies (Winding Up) Rules to preclude it. It is said that r. 158 of these Rules has a special purpose—namely, to prohibit a liquidator on the one side and an auctioneer or other person connected with the winding up on the other—from sharing their remuneration. The argument of Mr. King is that, on the true interpretation of the rule, the rule prohibits any arrangement by which the liquidator can get any more than he is entitled to under the Act and Rules, and that the rule in *Cradock v. Piper* (1) is excluded by its very wide and absolute terms. One can only get at the true meaning of the rule by construing it by the ordinary rules of grammar. The language of the rule does, in my judgment, prohibit any arrangement by which a liquidator may receive extra remuneration to that allowed by the Act and Rules. In this case there must have been some arrangement made between the two liquidators whereby one of them was to become entitled to some remuneration beyond what he is allowed by the Act and Rules, and in my judgment on the true interpretation of the rule the answer given by the learned Registrar is a good one.

The summons fails and is dismissed with costs.

Solicitors : *Abbott, Hudson & Anderson ; Reeve, Reed & Johnson.*

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(1) 1 Mac. & G. 664.

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1936

Nov. 19, 20.

In re LEWIS'S WILL TRUSTS.

O'SULLIVAN *v.* ROBBINS.

[1936. L. 1865.]

Will—Construction—Bequest of " securities (or the investments representing the same at my death if they shall have been converted into other holdings) "—Mortgage Debenture Stock redeemed—Money placed on deposit—No redemption.

The testator appointed the plaintiff his sole executrix and trustee. He bequeathed certain securities " (or the investments representing the same at my death if they shall have been converted into other holdings) " to the plaintiff upon trust for the benefit of a cousin for life. One of the named securities was redeemed during the testator's lifetime, and he placed the sum so received together with other money on deposit account with his bank and with the A. & N. Stores, Ltd.:—

Held, on the true construction of the clause, that there had been no ademption of the bequest. Money on deposit may be an investment.

In re Price ; *Price v. Newton* [1905] 2 Ch. 55, distinguished.

ADJOURNED SUMMONS.

The testator, Frederick Lewis, made his will on March 7, 1932, and he died on February 22, 1936. Probate was granted to the plaintiff, Norah O'Sullivan, the sole executrix and trustee, on April 5, 1936. After making certain pecuniary bequests he continued : " I bequeath the following securities (or the investments representing the same at my death if they shall have been converted into other holdings) namely 2000*l.* 4 per cent. Consolidated Stock 1000*l.* 4 per cent. Central Electricity Board Stock 1959/89 and 2000*l.* 4 per cent. Mortgage Debenture Redeemable Stock of Associated Electrical Industries to my Trustee upon Trust to pay the income therefrom to my cousin Mrs. Essie Robbins formerly Essie Allen for her life the same to be paid to her half-yearly commencing six calendar months after my death and on her death the said securities or investments shall fall into and form part of my residuary estate." He gave the residue of his estate to Norah O'Sullivan as to 5000*l.* to her absolutely and as to

the residue upon trust in her uncontrolled discretion for sons of another cousin. The 2000*l.* 4 per cent. Mortgage Debenture Redeemable Stock of Associated Electrical Industries was redeemed on July 19, 1935, with a premium of 200*l.* and the redemption moneys amounting to 2200*l.* in respect of principal and 2*l.* os. 9*d.* in respect of interest, were credited on the same date to the testator's current account at Lloyds Bank, Ltd. At the date of such credit there was already standing to the credit of the testator's account the sum of 314*l.* 1*s.* 3*d.*, and the sum of 400*l.* was, at the request of the testator, transferred to the testator's deposit account at the Bank, and as appeared from three deposit receipts given by the Army and Navy Stores on July 23, 1935, 2000*l.* was deposited with the Army and Navy Stores: 1000*l.* carrying interest at the rate of 3 per cent. per annum, a sum of 500*l.* carrying interest at the rate of $2\frac{3}{4}$ per cent. withdrawable on three months' notice, and the remaining 500*l.* at the rate of $2\frac{1}{2}$ per cent. per annum withdrawable on one month's notice. The question was whether in these circumstances there had been an ademption of the particular security redeemed before the testator's death.

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E. Riviere for plaintiff, executrix.

Prendergast for two infant defendants referred to Jarman on Wills, 7th ed., vol. ii., p. 1273, and *In re Price*; *Price v. Newton*. (1) If the deposit account is an investment, a trustee could keep trust money on deposit.

The Hon. Denys Buckley for the fifth defendant. I am in the same interest and adopt my friend's argument. The word "converted" is not a suitable word if the testator has sold an investment and put the money on deposit. Even if money on deposit at the Bank is an investment, the money on deposit at the Army and Navy Stores is not an investment, and the fact that interest is payable thereon does not make it one. If the gift be a general legacy then it fails, because it is now impossible to ascertain the value of the debentures.

Overton for the defendant, Essie Robbins. Your Lordship

BENNETT J. has not here to construe the word "investment" in vacuo. The words "other holdings" in the bracketed clause show that they are used as being "other investments." "Investment" has no fixed meaning and includes a deposit; one speaks of investing in the Post Office Savings Bank. This is a specific legacy, and the words in brackets show that that was the intention, and the trustee's duty is to get what now represents it.

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BENNETT J. [after reading the material clause in the will and stating the relevant facts, continued:] The question asked is "whether upon the true construction of the said will and in the events which have happened the bequest to the trustees thereof therein contained of 2000*l.* 4 per cent. Mortgage Debenture Redeemable Stock of Associated Electrical Industries has been adeemed or takes effect in regard to and operates so as to pass any and if so what part of the testator's estate." In my judgment the bequest has not been adeemed upon the true construction of the clause in question. The provision in parenthesis, "the investments representing the same at the time of my death if they shall have been converted into other holdings" must have been inserted with the express purpose of preventing ademption. The question really is whether the money placed by the testator on deposit can be regarded either as an investment or a holding within the meaning of the clause.

There is no express authority which binds me to decide that money on deposit is not an investment. The case of *In re Price; Price v. Newton* (1) turned entirely upon the context in which the words "pecuniary investments" occurred. Money on deposit can be, in accordance with popular parlance, spoken of as invested. The money placed on deposit at the Bank and also the money placed on deposit at the Army and Navy Stores can, I think, be so spoken of as invested.

Upon the language of this particular will I have no hesitation in holding that the moneys deposited at the Bank and at the

Army and Navy Stores, Ltd., were investments at the date of the testator's death representing the Mortgage Debenture Redeemable Stock and that those moneys on deposit pass under the bequest.

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In re ANDREW.

1936

July 17, 24;
Nov. 3.*Ex parte* OFFICIAL RECEIVER (TRUSTEE).

Bankruptcy—Judgment debtor—Execution levied—Withdrawal of sheriff by arrangement between debtor and creditor—Right of re-entry reserved—Sums paid under arrangement—Subsequent receiving order on petition of debtor—Execution incomplete—“Benefit of execution” —Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 40, sub-s. 1.

By s. 40, sub-s. 1, of the Bankruptcy Act, 1914: “Where a creditor has issued execution against the goods or lands of a debtor, . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.”

A judgment creditor having seized a debtor's goods under a writ of *fi. fa.*, an arrangement was come to between the judgment creditor and the debtor in order to avoid a sale. In pursuance of that arrangement the sheriff withdrew from possession, reserving the right of re-entry. Under the arrangement the debtor paid various sums to the judgment creditor in part payment of the debt and in satisfaction of the sheriff's fees. The debtor having failed to continue his payments the sheriff re-entered into possession under his power of re-entry. Subsequently the debtor filed his own petition and a receiving order was made against him, and later he became bankrupt. At the date of the receiving order the debt had not been paid in full:—

Held, that the words “the benefit of the execution” in sub-s. 1 of s. 40 of the Bankruptcy Act, 1914, did not refer to moneys actually received by the creditor in whole or partial satisfaction of his debt, whether under or in consequence of an execution or not, but that they referred to the charge which the creditor obtained by the issue of the execution, and that to the extent that by the payment of money that charge had been reduced or abrogated there was pro tanto no benefit of the execution to be considered. The benefit of the execution could only refer to the charge still remaining under the still subsisting execution for the balance of the debt.

Held, therefore, that the sums paid by the debtor before the date of the receiving order were not “the benefit of the execution” within the meaning of s. 40, sub-s. 1, and that the judgment creditor was entitled to retain them as against the trustee in the bankruptcy.

In re T. H. Godwin [1935] Ch. 213; *In re Samuels* [1935] Ch. 341 approved and applied.

Decision of Farwell J. affirmed.

APPEAL by the Official Receiver as trustee in the bankruptcy of the above-mentioned debtor from a decision of Farwell J. on a case stated by the judge of the St. Albans County Court.

The respondents, who were creditors, obtained judgment against the debtor on January 17, 1935, for the sum of 83*l.* os. 4*d.*, balance of debt, and 7*l.* 10*s.* costs. On the same day the respondents caused a writ of fieri facias to be issued and delivered to the high sheriff of Hertfordshire, and execution was levied on January 21, 1935. On January 23, 1935, an arrangement was arrived at between the respondents and the debtor and the sheriff's officer. Under that arrangement the sheriff's officer was to withdraw from the possession which he had taken, on the terms that the debtor should pay 25*l.* before withdrawal on account of the said judgment and the costs, and should thereafter discharge the debt by monthly instalments of 10*l.*, but the sheriff was to have the right to re-enter and take possession under the writ of fieri facias if there was default in performance by the debtor. The sheriff's officer withdrew on the debtor paying 25*l.* and a certain sum towards costs. On February 5 the sheriff remitted to the respondents 27*l.* 7*s.* 6*d.*, being the 25*l.* and 2*l.* 7*s.* 6*d.* for the costs of the execution. The debtor then paid to the respondents three further payments on account of the said judgment, 10*l.* on February 20, 8*l.* 11*s.* 6*d.* on March 25, and 10*l.* on May 13. On May 28, 1935, the debtor's solicitors issued to his creditors a circular letter which constituted an act of bankruptcy. On June 6 the sheriff re-entered in accordance with the arrangement mentioned above and seized and sold sufficient of the debtor's goods to realize the balance of the judgment. A receiving order was made on the debtor's own petition on June 18, 1935, and the sheriff accordingly handed the proceeds of the sale to the Official Receiver. No question arose as to the proceeds of this sale.

The Official Receiver, as trustee in the bankruptcy, claimed a sum of 53*l.* 11*s.* 6*d.*, the total of the sums paid to the respondents on account of the judgment debt up to May 13, 1935, in the circumstances set out above.

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C. A. Farwell J. holding himself bound by *In re T. H. Godwin* (1) and *In re Samuels* (2) held that the execution creditors were entitled to retain the money.

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The Official Receiver appealed. The appeal was heard on July 17 and 24, 1936.

Sir Terence O'Connor S.-G. and Tindale Davis for the appellant. Farwell J. in this case held that he was bound by the decisions in *In re T. H. Godwin* (1) and *In re Samuels* (2), and the question on this appeal is whether those cases were rightly decided. In the former case it was held that the phrase "the benefit of the execution" in s. 40, sub-s. 1, of the Bankruptcy Act, 1914, referred solely to the protection obtained by an execution creditor by reason of the issue of a writ of fi. fa. and its delivery to the sheriff, and did not include any payments to an execution creditor whether by the sheriff or by the judgment debtor. That statement, which appears on p. 223 of the report, goes, it is submitted, too far, whatever may be the result of the actual decision. *In re Samuels* (2) was to the same effect as *In re T. H. Godwin*. (1) In the present case the execution creditor had notice of an act of bankruptcy before the execution was completed, and the money in question should therefore, it is submitted, go to the general body of the debtor's creditors.

In *In re Ford* (3), execution having been issued upon a judgment for 80*l.* and costs, the sheriff on December 31, 1898, levied under a writ of fi. fa. On January 5, 1899, the debtor, under an arrangement with the solicitors of the execution creditors, paid the solicitors a sum of 40*l.* on account, and gave to the sheriff authority to re-enter under the writ of fi. fa. upon default in payment of any of the instalments of the balance at the agreed dates of payment. The sheriff thereupon withdrew. On January 14 a receiving order was made against the debtor on his own petition; at that date the sheriff had not re-entered under the writ of fi. fa. It was there held that the execution had not been completed as to

(1) [1935] Ch. 213.

(2) [1935] Ch. 341.

(3) [1900] 1 Q. B. 264.

40*l.* at the date of the receiving order, that the execution creditors were therefore not entitled to retain the benefit of the execution, and that the trustee in bankruptcy was entitled to the 40*l.* as part of the debtor's estate. That case was followed until the decision in *In re T. H. Godwin* (1), and was not referred to by Farwell J. in his judgment in the present case.

In re Ford (2) having been followed for more than thirty years should not be departed from.

There may be a series of levies under the same writ.

[GREENE L.J. Cannot it be said in respect of each levy that the execution is completed?]

It is submitted "No." The "benefit of the execution" means the benefit of the execution as a whole.

The effect of the various Bankruptcy Acts has been to bring more and more within the area of the property of the trustee available for distribution among the debtor's general creditors.

[They referred also to *Figg v. Moore Brothers* (3); *Trustee of John Burns-Burns v. Brown* (4); *In re Pearson* (5); *In re Godding* (6); *In re Evans* (7); *In re Brelsford*. (8)]

W. N. Stable K.C. and Anthony A. H. Marlowe for the respondents. Farwell J. was right in holding that the respondents were entitled to the moneys received by them before the date of the receiving order and his decision ought to be affirmed. In so holding he followed the decision of the Divisional Court in *In re T. H. Godwin* (1) and his own decision in *In re Samuels* (9), both of which cases, it is submitted, were correctly decided.

The phrase "the benefit of the execution" in s. 40, sub-s. 1, of the Bankruptcy Act, 1914, does not, it is submitted, refer to moneys actually received by the judgment creditor in whole or partial satisfaction of the debt, but refers to the charge which the creditor obtains by the issue of the execution. The moneys therefore in the present case paid by the debtor

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(3) [1894] 2 Q. B. 690.

(4) [1895] 1 Q. B. 324.

(5) (1886) 3 Morr. 187.

(6) [1914] 2 K. B. 70.

(7) [1916] H. B. R. 111.

(8) [1932] 1 Ch. 24.

(9) [1935] Ch. 341.

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to the respondents before the date of the receiving order were not "the benefit of the execution" within s. 40, sub-s. 1, of the Act of 1914, and they are therefore entitled to retain them as against the trustee in the bankruptcy.

Sir Terence O'Connor S.-G. replied.

Cur. adv. vult.

1936. Nov. 3. The following judgment of the Court (LORD WRIGHT M.R., ROMER and GREENE L.J.J.) was read by

LORD WRIGHT M.R. This appeal raises a question of importance on the construction of s. 40 of the Bankruptcy Act, 1914. The question is: What is the true construction of the words "the benefit of the execution or attachment," as to which the section provides in sub-s. 1 that the creditor is not to be entitled to retain it against the trustee in bankruptcy of the debtor unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or the commission of any available act of bankruptcy by the debtor. There is also a definition in sub-s. 2 in the following terms: "For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

The words now being considered have been the subject in the last few years of conflicting decisions by Divisional Courts. Although the section and the corresponding section in the Bankruptcy Act of 1883 have been in operation for a good many years, this is the first time that their true construction has come before the Court of Appeal. We are accordingly required to give our view as to the meaning of the section now in force without being bound by any previous authority, though deriving all possible assistance from the previous decisions. The matter comes before the Court on appeal from Farwell J. on a case stated by a county court

judge in the bankruptcy. The first question stated by the county court judge is as follows: "1. Whether on the facts stated in this case the moneys paid in the manner aforementioned can be retained as not being 'the benefit of the execution.' " If that question is answered in the affirmative, the two following questions do not arise. The learned judge, who decided that the moneys could be retained, did not deal with the two remaining questions. As we are in agreement with his conclusion, we do not feel it necessary to deal with any question other than that which has been stated.

The facts are simple. [His Lordship stated the facts as above set out and continued:] The Official Receiver, as trustee in the bankruptcy, claims a sum of 53*l.* 11*s.* 6*d.*, the total of the sums paid to the respondents on account of the judgment debt up to May 13 under the circumstances set out above. The question is whether he is right in that claim. The answer to that question depends on whether the moneys so received constitute the benefit of the execution within s. 40 of the Act and are claimable by the trustee against the creditors. Two views have been advanced. One is that the words "benefit of the execution" mean the fruits or the proceeds received by the creditor in consequence of the execution. It is contended for the trustee, that as they were received by virtue of the agreement stated above and in order to induce the sheriff to withdraw, they are the benefit of the execution; and it is further contended that as the sheriff when he withdrew reserved the right of re-entering if the agreement was broken, the execution was not complete before the notice of the presentation of the bankruptcy petition against the debtor or of the commission by the debtor of an available act of bankruptcy. The contention for the respondents is that "the benefit of the execution" does not refer to moneys actually received by the creditor in whole or partial satisfaction of his debt, whether under or in consequence of an execution or not, but that the words refer to the charge which the creditor obtains by the issue of the execution, and that to the extent that by the payment of moneys that charge has been reduced or abrogated, there is

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pro tanto no benefit of the execution to be considered. It is contended that moneys so paid in total or partial satisfaction of the charge and discharge of the debt, in whole or in part, become the creditor's moneys, just as if they had been paid without the intervention of an execution, and that in the facts of a case like the present what is meant by the benefit of the execution is the priority right constituted by the execution of the creditor over the debtor's goods for the debt or balance of the debt. Thus in the present case, while the respondents claim to retain the moneys collected before the sheriff withdrew under the agreement from possession, they do not deny that in respect of the balance the supervening bankruptcy has deprived them to that extent of the benefit of the execution which, to that extent, had not been completed by seizure and sale. Their contention is that s. 40 is restrictive of the rights which an execution creditor would otherwise have at common law in virtue of the writ of execution, in the sense that if the charge has not been made effective in due time by seizure and sale he loses that security or prior charge which he would otherwise have at common law over the debtor's goods.

This is the construction adopted by the Divisional Court in *In re Godwin* (1) and applied by Farwell J. in *In re Samuels* (2) in circumstances analogous to the present case but differing in certain respects from the facts in *In re Godwin*. (1) Farwell J. in the present case followed his own judgment in *In re Samuels* (2) without giving a further reasoned judgment. The appeal is from the reasoning contained in these two judgments.

In *In re Godwin* (1) an execution had been levied and goods had been seized by the sheriff. The debt and the costs of execution were then paid direct by the debtor to the judgment creditor, and the sheriff withdrew on the instructions of the judgment creditor. He withdrew unconditionally, reserving no power of re-entering. That happened on August 3, 1932. Before that date the entire indebtedness had been discharged, the last payment having been made on July 22,

(1) [1935] Ch. 213.

(2) [1935] Ch. 341.

1932. On December 6 the debtor was adjudged bankrupt on his own petition, which he had filed on November 21. The trustee in bankruptcy claimed that all the moneys which had been paid in discharge of the debt to the creditor in the circumstances above set out should be repaid to the trustee in bankruptcy on the ground that under s. 40, sub-s. 1, these moneys were the benefit of the execution, and that the execution had not been completed by seizure or sale before the date of the supervening bankruptcy. The county court judge dismissed the application and the trustee appealed. A Divisional Court, consisting of Luxmoore and Farwell JJ., affirmed the decision of the county court judge. They pointed out the startling nature of the contentions put forward by the appellants in that case in the following words (1): "The argument is certainly startling, for if it is right, an execution creditor who has received the full amount of his debt direct from the judgment debtor is liable to return that sum to the trustee in a subsequent bankruptcy, although the money was received and the execution unconditionally withdrawn many years before the adjudication, the only limitation on the liability being the expiration of the period prescribed by the appropriate Statutes of Limitation. It was not rendered less startling when it was admitted by counsel supporting it that if the payments in this case had been made by the judgment debtor to the sheriff instead of to the execution creditors direct, the amounts paid could not have been recovered, and that the position would be the same if the payments had been made without any writ of fi. fa. having been issued. The first question which arises on the construction of the section is what is the meaning of the phrase 'the benefit of the execution.' In the argument put forward on behalf of the appellants 'the benefit of the execution' was assumed to cover any benefit resulting to the creditor which might be attributed to the issue of the writ of fi. fa. It seems to us that the whole foundation of the argument fails if this assumption is incorrect. It is to be observed that the phrase is 'the benefit of the execution,'

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(1) [1935] Ch. 218, and see *errata* which should read "p. 219, line 5 from top."

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not 'any benefit from the execution,' or 'any benefit arising out of the execution'; and further, that there is no suggestion anywhere in this or the succeeding section of any repayment of money to the trustee in bankruptcy by the execution creditor." The judgment then went on to state the common law effect of the issue and delivery to the sheriff of a writ of fi. fa. After observing that the provisions of the present s. 40 were introduced for the first time in s. 45, sub-s. 1, of the Bankruptcy Act, 1883, the Court expressed its conclusion in the following words (1): "In our judgment, having regard to the nature of the protection obtained at common law by an execution creditor, and to the manner in which, and the purpose for which, the provisions of ss. 40 and 41 have been developed, and to the further fact that there is no mention in either of the sections of any payment by the execution creditor (*sic*) to the trustee in bankruptcy, the phrase 'the benefit of the execution' on the true construction of the section, refers solely to the protection obtained by an execution creditor by reason of the issue of the writ of fi. fa. and its delivery to the sheriff, and does not describe, and was never intended to describe, any of the payments to an execution creditor whether by the sheriff or by the judgment debtor. The section consequently relates only to executions which are in fact in existence at one or other of the appropriate dates mentioned in the section, and has no reference to an execution which has been unconditionally withdrawn long before any of those dates." There was, in fact, at the material time, no execution. The sheriff had withdrawn unconditionally at the request of the creditor, who had received payment of the debt in full. The Court reserved for further consideration a case such as that now being considered, where execution was withdrawn conditionally and was therefore still in force at the relevant date and a bankruptcy subsequently occurred.

The second judgment to which we have referred, that of Farwell J. in *In re Samuels* (2), dealt specifically with that state of affairs. In that case the sheriff had withdrawn on the creditor's request, and by arrangement between the

(1) [1935] Ch. 223.

(2) [1935] Ch. 341.

creditor and the debtor, but had reserved a right of re-entry to be exercised if the debtor made default in the payments which he had arranged to make in consideration of the withdrawal. The debtor paid various sums in part payment of the debt and costs, but subsequently filed his own petition and a receiving order was made against him. At that date the debt had not been paid in full, and the sheriff still retained his power of re-entry. It was claimed that under s. 40 the sums which the debtor had paid before the date of the receiving order were claimable by the trustee. The effect of the judgment is shortly stated in the headnote: "Held, that the sums paid by the debtor before the date of the receiving order were not the 'benefit of execution' within the meaning of s. 40 of the Bankruptcy Act, 1914, and that the judgment creditor was entitled to retain them as against the trustee in bankruptcy." The headnote interposes the word "for" between the word "not" and the words "the benefit of the execution"; that, we think, is a misprint. Farwell J. sums up the position in these words (1): "in my judgment a payment made to prevent a seizure and sale and to get rid of the execution in that way is not the benefit of the execution within the meaning of the words as used in s. 40 of the Act. Whatever the effect of reserving the right of re-entry may be, in my judgment a payment made to avoid an execution is not the benefit of the execution within the meaning of the Act." He applied the same construction of these material words as had been adopted in *In re Godwin*. (2) We agree with that conclusion, but we think it necessary to refer to the cases in which a different view has been taken. These cases have proceeded on the assumption that the benefit of the execution includes the fruits derived from the execution, or the moneys paid to the creditor in discharge or partial discharge of a judgment debt in respect of which a writ of fieri facias has been issued.

Reference may first be made to a decision of Clauson J. in *In re Brelsford* (3), in which case the sheriff withdrew from

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(1) [1935] Ch. 346.

(2) [1935] Ch. 213.

(3) [1932] 1 Ch. 24.

C. A. possession with the authority of the judgment creditors on
 1936 an undertaking of the debtor to make certain payments.
 ANDREW, The debtor made default and the sheriff re-entered into
In re. possession to levy execution for the balance of the debt.
 OFFICIAL While that was the position the receiving order was made.
 RECEIVER The trustee claimed from the creditors payment of the moneys
 (TRUSTEE), which they had received. The case therefore was similar to
Ex parte. *In re Samuels* (1) and the present case. It was contended
 by counsel for the creditors that they were not seeking to
 retain a benefit of an execution; that on payment the
 creditors' debt was discharged pro tanto, and thus the
 creditors received the benefit of their debt, and that benefit of
 the execution is a priority right in the debtor's goods, which
 at common law were charged with the debt from the issue of a
 writ of fi. fa. Clauson J. held that the creditors were not
 entitled to retain the moneys, mainly, if not entirely, because he
 was bound by a decision of a Divisional Court in *In re Ford* (2)
 to which we shall shortly refer. *In re Brelsford* (3) was followed
 by *In re P. E. & B. E. Kern.* (4) That case came before a
 Divisional Court composed of Clauson and Luxmoore JJ. The
 main point there decided was whether the right of the trustee to
 recover the moneys received by the execution creditors was
 limited to moneys received by them after the date to which the
 trustee's title to the bankrupt's property related back under s. 37
 of the Act. It was held that the scope of s. 40 of the Bankruptcy
 Act was not so limited. The judgment, however, does proceed
 upon the construction of the words of s. 40 now being considered,
 in a sense contrary to that accepted in *In re Godwin* (5), and
 contrary to what we consider to be the true construction.
 The passage in the judgment of Clauson J. in which that view
 is stated is worthy of quotation (6): "It appears to me
 that the section says in terms as plain as one could desire
 that, if in the particular circumstances in the section men-
 tioned, that is to say, of a receiving order having been made
 before completion of the execution, the execution creditor

(1) [1935] Ch. 341.

(2) [1900] 1 Q. B. 264.

(3) [1932] 1 Ch. 24.

(4) [1932] 1 Ch. 555.

(5) [1935] Ch. 213.

(6) [1932] 1 Ch. 555, 560.

has received fruits of the execution, he shall not retain those fruits of his execution against the trustee in bankruptcy ; in other words, he must hand them to the trustee if he asks for them. It appears to me that there is nothing in the section which lays down any limit of time or imports any other limitation on the trustee's rights. It is suggested that this construction has the result that, since an execution may, in accordance with the practice to which I have alluded, be prolonged for many years, the hardship is involved that after a long lapse of time the trustee in bankruptcy may be entitled to go back to the beginning of the execution, and get back from the execution creditor sums which he has received, it may be, many years before. I confess that such possible result does not strike me as a hardship. It must be borne in mind that it is the execution creditors' own act which kept this execution on foot, assuming it could legally be kept on foot ; and, further, they kept it on foot for their own benefit in order, no doubt, to obtain advantage by getting payment of instalments out of the execution debtors. I cannot see how the operation of the Act results in any hardship. The execution creditors have put themselves into this position entirely for their own purposes. If they chose to keep the execution on foot for a long time for their own purposes, I do not see how they can complain. Accordingly, as there seems to me to be no real hardship, I do not see why I should put any other construction on this section than that which appears to me to follow from the plain and obvious meaning of the words." It seems to us, with all respect, clear that the learned judge when he talks of "fruits of the execution" is incorrectly paraphrasing the words of the section, and while we agree with his statement of the startling results which would follow from his construction, we cannot agree with him that such results should not be regarded as a hardship. Execution creditors who are willing to stay their hands in enforcing an execution do so at least as much for the benefit of the debtor as for their own benefit. It is common business understanding that it is desirable, as far as possible, to help a debtor to pay by giving him all possible

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C. A. time. We respectfully differ from the learned judge on his
1936 view of what is the plain and obvious meaning of the words.

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Before passing to *In re Ford* (1) reference may be made to a decision of a Divisional Court in *In re Fairley* (2) in which the Court held that an execution was completed within s. 40 by a return by the sheriff of nulla bona. The Court there treated the fact that the execution was no longer subsisting when the bankruptcy supervened as a sufficient ground for not applying the section. P. O. Lawrence J. said (3): "An execution is no doubt incomplete if the sheriff has been induced, by payment on account or otherwise, to withdraw temporarily. Moreover the authorities seem to show that an execution may be incomplete, even though the sheriff withdraws permanently—e.g., where on payment of part of the debt in order to avoid a sale, the sheriff with the execution creditor's assent withdraws permanently." The same result was applied to the case where the execution resulted in a return of nulla bona, but the terms of s. 40, sub-s. 2, of the Act seem to us to be quite explicit; the execution must be completed by seizure and sale. We cannot see how the words of s. 40 can be construed by reference to the ampler definition of "completion" in s. 41, sub-s. 1, which deals with a quite different subject-matter, namely, the disposal of moneys or goods in the hands of the sheriff. To treat the language of s. 41 as imported into s. 40, as was done by Horridge J. in *In re Godding* (4), appears to us to be illegitimate. It is obvious that the Court, assuming or adopting the construction which we have rejected of the words "the benefit of the execution," felt the difficulties thereby involved in the definition of "the completion of the execution" in s. 40.

Of the various authorities which have been referred to in argument there are only two others which we think it necessary to discuss here. One is *In re Ford* (1), a decision of a Divisional Court, where a payment was made on account in consideration of withdrawal by the sheriff, but subject to the sheriff being authorized to re-enter if the debtor should make

(1) [1900] 1 Q. B. 264.

(2) [1922] 2 Ch. 791.

(3) *Ibid.* 801.

(4) [1914] 2 K. B. 70.

default in making the payments which he had undertaken to make. The matter fell to be decided under s. 45, sub-s. 1, of the Act of 1883, which was substantially identical with s. 40 of the present Act. The Divisional Court, consisting of Wright J. and Channell J., held that there had been no completion of the execution and that the creditor, who had obtained the payment on account in partial discharge of his debt, was bound to hand it over to the trustee in the supervening bankruptcy. There was, as we read the report, no argument on the construction of the crucial words; it seems to have been assumed that "benefit of the execution" referred to money paid by the debtor to the creditor, and the discussion seems to have centred on what was meant by "the completion of the execution." There was no reference in the judgments to a previous decision of a Divisional Court in *In re Pearson*. (1) That decision specifically related to s. 46, sub-s. 2, of the Bankruptcy Act of 1883, which partially corresponded to s. 41 of the present Act. We only refer to that decision because reference is there made to a dictum of Cleasby B. in *Stock v. Holland* (2) that money paid to prevent the execution from being completed, and as soon as it was assented to, became the money of the creditors. Cave J. observed in *In re Pearson* (3) that when the debtor has paid out the execution the creditor does not want the execution at all. That, no doubt, was said in regard to a complete discharge of the debt, but we think it equally applies to a partial discharge under an execution. There is in such cases no question of the benefit of the execution as something subsisting. To the extent that the creditor has been paid his debt under and in virtue of an execution, the debt is pro tanto discharged, and to that extent there is, in our opinion, nothing on which s. 40 can operate. The operation of the section in such cases is limited to cases where there is at the date of the receiving order or when the creditor has notice of a bankruptcy petition or of an act of bankruptcy still on foot a subsisting execution, and is limited to the

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(1) 3 Morr. 187. (2) (1874) L. R. 9 Ex. 147, 150.

(3) 3 Morr. 187, 192.

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balance for which the execution is still operative. In respect of that balance it is true that there is a benefit of the still incomplete execution which may be affected by the operation of s. 40, sub-s. 1. In this connection the result is the same whether the payment has been made to avoid seizure or to avoid sale, or whether the partial discharge of the debt has been effected by a sale of goods under an execution which is kept on foot in order, if possible, to realise enough to pay the balance of the debt. We think, however, that s. 40 cannot apply if there is no subsisting execution, and that it is immaterial, if there is no execution on foot, whether the execution has been terminated by a return that the whole debt has been realised, or whether the execution has been withdrawn by the sheriff at the request of the creditors, or whether there has been a return of nulla bona or he has withdrawn for any other reason. Sect. 40 can only apply if or to the extent that there is a subsisting execution which is still operating to charge the debtor's goods, and it cannot operate in so far as goods have already been sold and the proceeds applied to the partial discharge of the debt, or where payments on account have been made by the debtor in partial discharge of the debt in order to avoid seizure or sale, or to induce a temporary withdrawal by the sheriff. In our opinion, to the extent that the debt has been actually discharged, it is impossible to apply to money so paid the appellation of "the benefit of the execution." The money so paid has, in our opinion, become the money of the creditor with the result of wiping out pro tanto the debt. The benefit of the execution can then only refer, in our opinion, to the charge still remaining under the still subsisting execution for the balance of the debt.

The appeal must be dismissed and the first question in the special case, which alone is now material, answered in the way in which it has been answered by Farwell J.—namely, in the affirmative.

Appeal dismissed.

Solicitor for the appellant : *Solicitor to Board of Trade.*

Solicitors for the respondents : *Wallington, Fabian & Co.*

W. I. C.

In re A JUDGMENT DEBTOR.

[No. 1539 of 1936.]

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Bankruptcy—Bankruptcy notice—Substituted service—Debtor an airman on flight to Australia and back—Order of Registrar for substituted service on debtor at his place of business in London and on him care of his solicitors—Debtor's solicitors not his agents to accept service of notice—No opportunity given to debtor of complying with notice—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 1, sub-s. 1 (g); s. 2—Bankruptcy Rules, 1915, rr. 143, 156.

The debtor, an aviator, against whom the creditors had obtained judgment for a debt, three days later left England on a flight to Australia and back. The creditors thereupon obtained from a Registrar in Bankruptcy an order for substituted service of a bankruptcy notice on the debtor by registered letter addressed to him at his place of business in London and also to him care of his solicitors. The bankruptcy notice required compliance with its provisions within seven days:—

Held (reversing the order of the Registrar), (1.) that the case was not one in which an order for substituted service ought to have been made, as it was improbable in the circumstances that the service of the notice would come to the knowledge of the debtor within the time limited by the notice for compliance with its requirements, and (2.) that the debtor's solicitors were not sufficient agents for receiving the notice, as it was for the debtor himself and not his solicitors to decide within the seven days whether he would pay the debt.

Porter v. Freudenberg [1915] 1 K. B. 857 applied.

APPEAL by the debtor from an order of Mr. Registrar Kean refusing to set aside an order for substituted service of a bankruptcy notice.

The following statement of the facts is taken from the judgment of Slessor L.J.:—The debtor appears to have made himself liable in an action in the King's Bench Division for a certain sum of money, and in relation to that liability a letter was sent to his solicitors on July 30, 1936, to the effect that the creditors' solicitors had issued on behalf of their clients a bankruptcy notice against the debtor based upon the judgment which they had obtained: "We beg to give you notice that we have issued a bankruptcy notice against your client, and we shall be glad to hear from you with an early appointment to serve him with a copy thereof." In reply to that letter the solicitors for the debtor wrote to the

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solicitors for the creditors acknowledging the letter and adding: "As you will doubtless have seen in the newspapers, the debtor left on his Empire flight yesterday, and is now, we hope and believe, well on his way to the Antipodes. In these circumstances we fear that it is really impossible for us to arrange an appointment for you to serve him with the bankruptcy notice which you have seen fit to issue. We believe, however, that he will be back in this country in about three weeks' time, when doubtless something can be arranged."

Then follows, on August 1, a letter from the solicitors for the creditors which I think calls for severe condemnation, because it makes, without any reason whatever, a very serious charge against the debtor, based, so far as I know, on no grounds at all. It is in the following terms: "We have yours of the 31st ultimo and note that your client has left the country. We shall have to consider as to applying for substituted service by advertisement or to put on a petition alleging that your client has left the country with intent to defeat and delay his creditors." I may say that, though that entirely reckless allegation appears in that letter, no attempt was made at any time subsequently to support it, and Mr. Tindale Davis has very frankly stated that such an allegation never formed and does not now form any part of his case, which makes the allegation the more regrettable. The letter goes on: "You must be perfectly well aware that a debtor is not entitled to leave the country for his own pleasure when he has a judgment against him without making provision for payment of same. We do not understand what you mean when you say he will be back in three weeks' time when doubtless something can be arranged." Why they do not understand it, I do not know; the language seems quite clear on the face of it. "Our clients require payment of the whole amount."

Then on August 5 the solicitors for the debtor reply: "You must, of course, take whatever steps you think fit. If you can satisfy the Court that the debtor has left the country with intent to delay and defeat his creditors you will, we venture to think, be rather fortunate. Apart from

the suggestion being entirely unjustified the debtor has no intention whatever either to delay or defeat his creditors, and, as you must well know, his Australian flight has been in contemplation and preparation for some considerable time, and he was bound to proceed with it at the first available opportunity. The whole object of the flight was to establish a record run to Australia and back, which alone evidences his intention to return to this country at the earliest opportunity. We are, moreover, instructed that the debtor is making arrangements to meet his obligations. Precipitate and violent measures will only have the result of frustrating his efforts. Might we suggest that your clients exercise a little patience."

On August 6 the solicitors for the creditors write: "Your client was not bound to make the flight as he was under no contract, as far as we know, to do so. Our clients will not wait for payment of the money, it being represented to the Court that the debtor was a wealthy man and could pay directly he was asked for the money. We shall take whatever steps we are advised in regard to this matter. We intend to proceed forthwith."

On August 7 the solicitors for the debtor reply: "We really do not propose to argue with you about it, except to point out that it is quite untrue to state that any representation was made by or on behalf of the debtor as to his wealth or his ability to pay. . . . You must, of course, take such steps as you are advised, but you may be assured that any attempt to get an order for substituted service by advertisement when the debtor's whereabouts are well known, or to put in a petition containing such allegations as you suggest in your letter of August 1 or in the following letters, will meet with the strongest resistance. We think that the motive of your clients—for we cannot believe that these suggestions were made otherwise than on their instructions—in making these threats is a reprehensible one."

Then on August 13 the solicitors for the creditors say: "Are you prepared to give us a date when the defendant will be in England so as to enable us to serve him with a

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C. A. bankruptcy notice? If not"—and then follows a repetition
1936 of this offensive remark—"we can only assume that the
A defendant is remaining out of England with intent to delay
JUDGMENT and defeat his creditors, as you will bear in mind that you
DEBTOR, informed us that the defendant, at the time of going away,
In re. would be back in England within three weeks."

On August 17 there is yet another letter, but I do not think it carries the matter any further.

The next stage in the case was this: that an affidavit was sworn on August 24 by a Mr. Albert Edward Nicholls, a clerk to the creditors' solicitors, to say: "That having been instructed by my principals to serve the debtor with the bankruptcy notice herein I did on the 30th day of July 1936 attend at . . . the debtor's place of business and I saw a lady who said she was his secretary and that she believed he was then on his way to Australia. She said she was not certain whether he had commenced his flight that day or whether it was to take place the next day. I asked her if she had had any instructions about the debtor's letters and she said No she had not heard the whole of that day from the debtor." Then he says that his principals caused two letters to be written, one addressed to the debtor, of which the effective part was as follows: "Our representative attended upon you at the above address for the purpose of serving you with a copy of the bankruptcy notice issued against you herein but was unable to meet with you. This is to give you notice that he will again attend at the above address on Tuesday, August 4, at 2.15 P.M. for the before-mentioned purpose. If this appointment is inconvenient to you, please make another. Should you fail to keep this or such substituted appointment as made by you we shall have no alternative but to apply to the Court for an order for substituted service in such manner as the Court may direct."

A similar letter was addressed to his solicitors to say: "We beg to give you notice that we have issued a bankruptcy notice against your client, and we shall be glad to hear from you with an appointment to serve him with a copy thereof."

Then the letters to which I have referred were exhibited, and finally there is this paragraph: "The judgment upon which the bankruptcy notice was issued was obtained on the 27th of July 1936 and the debtor was in Court at the time when judgment was given against him and he was fully aware that the judgment was entered and that he had to pay the same." And then follows this request to the Court: "Under the circumstances I ask the Court to grant an order for substituted service of this bankruptcy notice by advertisement in the London Gazette and the Daily Telegraph."

On August 26 a letter was written to the solicitors for the debtor, saying: "We beg to give you notice that we have issued an order for substituted service of the bankruptcy notice by registered letter post addressed to your client at Sardinia House, Kingsway, and also addressed to him c/o yourselves. The order has to-day been drawn and letters posted in accordance with the same." That was a true statement of what had been done: there had been drawn an order for substituted service on the ex parte application in accordance with the provisions of the Bankruptcy Acts.

But the matter did not end there, because subsequently an application was made for the setting aside of the order for substituted service on grounds which were substantially those which Serjeant Sullivan has argued before us this morning, and therefore it is not necessary to mention them as they were placed before the Registrar, because I shall deal with them as the arguments which were addressed to us. But as a result of that hearing the order for substituted service was not suspended, and it is from that order, whereby Mr. Registrar Kean dismissed the motion of the debtor to set aside an order for substituted service made on August 25, that this appeal is brought. It only remains to say that the order for substituted service which was made, dated August 26, was not in the form which had been sought in the affidavit of Mr. Nicholls—namely, by advertisement in the London Gazette and the Daily Telegraph—but took the following form: "It is ordered that the sending of a sealed copy of the above-mentioned bankruptcy notice,

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C. A. together with a sealed copy of this order, by registered
1936 post, addressed to (the debtor) at and also
A by registered post addressed to (the debtor) c/o Messrs.
JUDGMENT _____ in the County of London, shall be deemed
DEBTOR, to be good and sufficient service of the said bankruptcy notice
In re. on the said (debtor) on the day of completing such posting as
aforesaid."

The appeal was heard on November 27, 1936.

Serjeant Sullivan K.C. and *Neil Lawson* for the appellant.
Sect. 1 of the Bankruptcy Act, 1914, creates the statutory act of bankruptcy. It provides: "A debtor commits an act of bankruptcy in each of the following cases: . . . (g) If a creditor has obtained a final judgment or final order against him for any amount, and execution thereon, not having been stayed, has served on him in England, or by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf giving leave to effect the service, either comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained." By r. 143 of the Bankruptcy Rules, 1915: "A bankruptcy notice shall be served, and notice thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition." By r. 156: "A petition shall be served upon the debtor by an officer or bailiff of the Court, or by the creditor or his solicitor, or by some person in their employ; provided that if personal service cannot be effected, the Court may extend the time for hearing the petition, or if the Court is satisfied by affidavit or other evidence on oath that the debtor is keeping out of the way to avoid such service, or service of any other legal process, or that for any other cause prompt personal service cannot

be effected, it may order substituted service to be made by delivery of the petition to some adult inmate of his usual or last known residence or place of business, or by registered letter, or in such other manner as the Court may direct, and that such petition shall then be deemed to have been duly served on the debtor." And by r. 158: "Where a debtor petitioned against is not in England, the Court may order service to be made within such time and in such manner and form as it shall think fit."

In making an order for substituted service of a bankruptcy notice the Court ought not to make one with the requirements of which it is impossible for the debtor to comply. Here the respondents were aware that the debtor had started on a flight to Australia and could not possibly return until after the expiration of the seven days limited by the bankruptcy notice. In such circumstances the order of the Registrar amounted to a denial of justice and should be set aside.

There is no direct authority on the point in the present case under the bankruptcy practice, but Order IX., r. 2, of the Rules of the Supreme Court contains provisions with regard to the substituted service of a writ—similar provisions to those in r. 156. Under r. 2 a Divisional Court in *Alder v. Benjamin* (1) refused to grant an order for the substituted service of a writ in the case where the defendant was temporarily absent from England. In *Porter v. Freudenberg* (2) Lord Reading laid down the general principles on which the Court should act in granting or refusing an order for substituted service of a writ. Those principles, it is submitted, are of general application and apply to the case of a bankruptcy notice, and should be followed in the present case.

Tindale Davis for the respondents. The question is one entirely within the discretion of the Registrar, and the Court ought not to interfere unless it is satisfied that he has proceeded on a wrong principle. I rely on r. 156 of the Bankruptcy Rules, 1915, and submit that the order of the Registrar was properly made.

The debtor was in this country when the judgment debt

(1) (1885) 1 Times L. R. 308.

(2) [1915] 1 K. B. 857.

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C. A. was obtained on July 27, 1936, and remained here for three days after that date. He may not have known of the order for substituted service having being made against him, but his solicitor did, and his solicitor must be regarded as his agent to accept service of the bankruptcy notice: see *In re Nelson*. (1) If the notice comes to the knowledge of the agent that is an effective notice.

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SLESSER L.J. This is a case which raises a very important question with regard to the rights of a debtor, who may be liable to have pronounced against him an act of bankruptcy, to receive adequate service of notice of the intention of the creditor to proceed against him. The facts of the case, so far as they are to be gathered from the affidavits and from the correspondence thereto annexed, are these. [His Lordship then stated the facts as above set out and continued:] It is true that the Bankruptcy Act, 1914, contains provisions giving a considerable discretion to the Registrar in the matter of service. It is provided by r. 143 of the Bankruptcy Rules that a bankruptcy notice shall be served, and service thereof shall be proved "in the like manner as is by these Rules prescribed for the service of a creditor's petition." The relevant provision dealing with the substituted service of a creditor's petition is r. 156, which is in the following terms: "A petition shall be served upon the debtor by an officer or bailiff of the Court, or by the creditor or his solicitor, or by some person in their employ; provided that, if personal service cannot be effected, the Court may extend the time for hearing the petition." And then follow these material words: "or if the Court is satisfied by affidavit or other evidence on oath that the debtor is keeping out of the way to avoid such service, or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition to some adult inmate in his usual or last known residence or place of business, or by registered letter, or in such other manner as the Court may direct;

(1) [1918] 1 K. B. 459.

and that such petition shall then be deemed to have been duly served on the debtor."

There are words almost similar in effect to these words in the Rules of the Supreme Court, Order IX., r. 2 ; but for my part I do not think it necessary, at any rate in the first place, to consider the exact language of these rules at all. In my opinion the right way to look at this case is to consider in the first place what are the rights of the person on whom the notice is to be served, generally, arising out of recognized principles of law.

The general position of a person to whom notice is addressed that legal process may be made against him which may result in consequences prejudicial to him and which in certain circumstances he may be able, by performing certain acts, to avoid, and the position even more generally, is discussed in *Porter v. Freudenberg* (1), and more particularly considered in the judgment of Lord Reading, who delivered the judgment of the Court. His Lordship was there considering the conditions under which substituted service might be permitted, a problem which had become particularly acute at the outbreak of the recent War by reason of the fact that service was sought against persons who had thereby become alien enemies ; but the observations of the Court are of general application. Lord Reading laid down in general terms what are the considerations which should move a judge in Chambers before whom an application is made for substituted service of a writ, and he said this (2) : First, " to satisfy himself that there exists a practical impossibility of actual service." That matter does not here arise, because clearly on the evidence there was not a practical possibility of actual service, seeing that the debtor, by common agreement, was at the time out of the realm. Next : " To satisfy himself . . . that the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant." Then follow these extremely important words : " Our English procedure

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(1) [1915] 1 K. B. 857.

(2) *Ibid.* 889.

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has hitherto been laudably superior to the Continental in not permitting that which may be called 'constructive service,' such as, e.g., by public notices or advertisements, whereby a defendant may be condemned unheard because he has had no knowledge of the proceedings against him." Those later words indicate clearly to my mind that the Court of Appeal in *Porter v. Freudenberg* (1) were considering not only the important problem which was there raised, for the reasons which I have stated, but were considering the general principle of law that the defendant shall not by defective notice be condemned unheard because he has no knowledge of the proceedings against him.

In such a case as the present—and indeed, it may be, in dealing with all instruments which call upon a party to answer a claim at law—one has to consider what exactly the notice to be given calls upon the person served to do, and what rights it gives him. In the case of an act of bankruptcy—which is a matter of the most serious public consequence, involving, if it be followed ultimately by a declaration of bankruptcy, deprivation both of public and of private civil rights, disallowing the debtor to serve in public capacities or in either House of Parliament, disabling him from performing public functions, and interfering with his ordinary rights as a citizen to make such contracts as he will—the Court should, if anything, be more careful than it might be in ordinary legal process resulting, perhaps in damages, or some other legal consequences. Perhaps one need not say "more careful," because complete care is necessary in every case. In so far, however, as Mr. Tindale Davis has argued that some distinction is to be made in favour of the creditor in dealing with the Bankruptcy Rules in contradistinction to the Rules of the Supreme Court, I say that, if any distinction is to be made, it ought to be made in favour of a more rigorous interpretation of the Bankruptcy Rules, which are in their very nature of a penal or semi-penal character. In point of fact the principles stated in *Porter v. Freudenberg* (1) are of entirely general application.

(1) [1915] 1 K. B. 857.

In the present case the notice gives, under the law, certain rights to the person against whom the act of bankruptcy is alleged to save himself from the consequences thereof within a certain period if he performs certain acts. The order says that within seven days he must pay to the creditors, and if he does so pay within the seven days he may be acquitted of all the consequences which might flow from a failure to pay. We must therefore have regard to this: that he is first of all given notice of the fact, and he is also given notice that within seven days he has a *locus poenitentiae* and may avoid the consequences which might otherwise flow. There could not be a case, in my opinion, where it is more essential that he should be given his full rights.

In my view, both in relation to an act of bankruptcy and in relation to a petition, such a case is carefully safeguarded by r. 156, which sets out certain grounds on which substituted service may be allowed, such as the delivery of the petition to an adult inmate at his usual place of business, or by registered letter, both of which means, in my view, are machinery devised for the purpose of seeing that the debtor does not lose his rights for want of effective notice of what is being done. Then follow the words "or in such other manner as the Court may direct." Here there is no question of service upon an adult inmate at the debtor's usual or last known residence or place of business, and there is no question of a registered letter. The service is to be done "in such other manner as the Court may direct." As I have pointed out, that "other manner" was laid down, not by advertisement, as was requested, but by registered letter addressed to the debtor at a certain house in England where it was known to all persons that he was not—nor could he possibly be within seven days—and c/o his solicitors at a certain address in London. In the circumstances of this case, it seems to me entirely impossible that such a notice sent to him by registered post in London on August 26 could possibly, in his then situation, have been an effective notice to him giving him his necessary rights under the Bankruptcy Act.

The same view applies to a notice sent to his solicitors.

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Mr. Tindale Davis has argued that the notice to his solicitors as his agents was a notice to him. My first comment on that argument is that it is not to be, under the order, a notice to the solicitors but a notice to the debtor c/o his solicitors, which is no more than another way of giving him notice at a different address. In any event, the solicitors clearly cannot be sufficient agents for this purpose. Within seven days the debtor has to decide whether he will or will not pay the debt. His solicitors have no authority from him that can possibly here be gathered to pay that debt for him. It is he and not his solicitors who has to decide whether he will pay the debt.

For all those reasons I think that there is not and that there cannot be in this case a proper notice by registered letter; nor is the manner which the Court has directed one which gives the debtor such a notice as satisfies the Bankruptcy Rules. It follows, in my judgment, that the debtor has had no notice lawfully served upon him at all and that he is in the position of a person who has received no notice of service either by substitution or otherwise. Consequently, this appeal must succeed.

ROMER L.J. It is a fundamental principle of English law that a person shall have effective notice, if it be possible, of any process instituted against him in our Courts, and certainly none the less because that process is a bankruptcy process. It is plain from the review of the facts which has just been made by my Lord that in this case that fundamental principle has been disregarded. The appeal must be allowed.

GREENE L.J. I agree.

Appeal allowed.

Solicitor for appellant: *D. W. Plunkett.*

Solicitors for respondents: *Woolfe & Woolfe.*

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In re LEIGHTON'S CONVEYANCE.

[1935. L. 2211.]

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Dec. 11.

Mortgage—Mortgagee's costs—Adding costs to security—Mortgagor suing as a "Poor Person"—R. S. C. Order XVI., r. 28; Order LXV., r. 1.

The general rule that a mortgagee is entitled to add the costs, charges and expenses of defending his title to his security applies notwithstanding that the mortgagor has obtained leave to sue as a poor person. Order XVI., r. 28, which provides that "a poor person shall not be ordered to pay any costs" is dealing with costs of litigation and not with such a matter as a mortgagee's right to add his costs, charges and expenses to his security, which is treated as an incidental or implied term of the mortgage contract.

APPEAL from an order of Luxmoore J. so far as it directed that Ellen Massingham, one of the respondents in the action, was not entitled to add her costs of the matter in the court below to her security.

The action was commenced by originating summons and was entitled In the matter of two indentures both dated April 3, 1928, and In the matter of the Land Registration Act, 1925. The applicant on the summons, Amelia Jane Wardham (commonly known as Kathlyn Priestman) who sued as a poor person, claimed to be the owner in fee simple of certain registered land, and the respondents were the trustee of the property of Claud Effie Margery Bergin (commonly known as Ethel Bergin), a bankrupt, now deceased, and three other parties, Ellen Massingham, Frederick Thomas Baker, and M. B. Foster & Sons, Ltd., who were joined as first, second and third chargees respectively of the premises in question.

The claim in the summons was that the Land Register should be rectified by the registration of Mrs. Priestman in the place of Mrs. Bergin as proprietor of the registered land on the ground that the transfer of the registered land from Mrs. Priestman to Mrs. Bergin was a forgery, and it was further claimed that the mortgages of the registered land, which the three respondents claimed to hold, might be

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declared to be void, and that the Land Register might be rectified by the removal from the Charges Register of their titles. Points of claim were ordered and subsequently amended by substituting a plea of non est factum for the allegation of forgery. By a further amendment the applicant said that the signature to the transfer was obtained by fraudulent misrepresentation and/or the undue influence of Mrs. Bergin.

The action was tried before Luxmoore J. who in circumstances which are immaterial for the purposes of this report ordered that the Register should be rectified by cancelling the entries in the Proprietorship Register and registering Mrs. Priestman as proprietor of the land, but subject to the charges mentioned in the Charges Register, which he held to be valid. He refused, however, to make any order as to the costs of the application and ordered that the respondent mortgagees were not to add their respective costs of the application to their respective securities.

Ellen Massingham appealed from so much of the order as prohibited her from adding her costs to her security.

The appeal was heard on December 11, 1936.

Archer K.C. and *Donald Cohen* for the appellant. By Order LXV., r. 1, of the Rules of the Supreme Court it is provided that nothing therein contained shall deprive a mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division.

It is well settled law, that a mortgagee is entitled to the costs of defending his rights: and the Court has no power in an ordinary case to deprive him of them: *In re Wallis*. (1) He will only be deprived of such costs if he acts unreasonably: *Charles v. Jones*. (2)

It is true that the special rule as regards costs against poor persons (R. S. C. Order XVI., r. 28, sub-r. 1) provides

(1) (1890) 25 Q. B. D. 176.

(2) (1886) 33 Ch. D. 80, 84.

that, unless the Court or a judge shall otherwise order, no poor person shall be liable to pay costs to any other party; but it is not suggested in this case that the applicant in this case should be ordered personally to pay any costs. A mortgagee's costs of defending his security are not properly payable by the mortgagor, but according to the rules of the Chancery Division are added to the security.

It is submitted therefore that Mrs. Massingham is entitled to add her costs of the proceedings to her security and that the order of Luxmoore J. to the contrary was wrong.

[They also referred to Fisher and Lightwood's Law of Mortgage, 7th ed., pp. 752-753.]

Neville Laski K.C. and *Eric White* for the respondent Mrs. Priestman suing as a poor person. The adding by a mortgagee of his costs to his security is a matter of contract between him and the mortgagor. Here the respondent Mrs. Priestman was not the mortgagor, nor is she liable under the contract between the appellant and her mortgagor, Mrs. Bergin. If the costs are added to the appellant's security, the result will be that Mrs. Priestman will be liable to pay the appellant's costs. This is contrary to R. S. C. Order XVI., r. 28, sub-r. 1.

Roger Turnbull for the respondent F. T. Baker, the second mortgagee, and *J. V. Nesbitt* for the respondents M. B. Foster & Sons, Ltd., the third mortgagees, also supported the contention that Mrs. Massingham was not entitled to add her costs to her security and referred to *Parker v. Watkins*. (1)

Archer K.C. was not called upon to reply.

LORD WRIGHT M.R. [after reading the summons:] That was the form of the originating summons, but points of claim were ordered and were amended, and I just want to refer to one allegation in the amended claim. In para. 6 "the applicant says that the signature to the said transfer was obtained by the fraudulent misrepresentation and/or the undue influence of Mrs. Bergin." That is a claim that the transfer ought to be set aside, that is to say, was voidable

(1) (1859) John. 133, 137.

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on the ground of fraud. There was a further alternative of non est factum, which as I understand was afterwards extended by setting out particulars which would bring the case within the principle of non est factum. The amendment was very informal, but that is the effect of it as stated by Mr. Archer.

In those circumstances, the learned judge has done this : he has ordered that the Land Register is to be rectified by cancelling the entries in the Proprietorship Register and registering Mrs. Kathlyn Priestman as proprietor of the land which is subject to the charge mentioned in the Charges Register. He has declared against Mrs. Bergin's title or rather that of her trustee in bankruptcy, and he has declared in favour, first of Mrs. Priestman's title, and secondly, of the charges which he has said the land is subject to. That would naturally follow if the learned judge were satisfied that the conveyance was obtained by fraud, but that before the conveyance was set aside, the charges had been duly executed by the then registered proprietor, and the chargees had taken in good faith and without notice.

There is no question as to the learned judge's decision on these points, but then the learned judge has added this to his order : " This Court doth not think fit to make any order as to the costs of the said application and the respondents, Frederick Thomas Baker Ellen Massingham and M. B. Foster & Sons Limited, are not to add their respective costs of the said application to their respective securities."

As a matter of fact, Mrs. Massingham, for whom Mr. Archer appears, is the first chargee, and she is the appellant, because she is primarily interested, though it is possible that the other chargees may also have some interest in the matter.

Now what the learned judge has done is to deny the ordinary right of a mortgagee to add to his security all costs, charges and expenses reasonably and properly incurred in ascertaining or defending his rights, or in recovering the mortgage debt. It is not really a matter which arises in connection with the awarding of costs. If it had been a question of the awarding of costs as between parties to the action the learned judge could not have ordered Mrs. Priestman

to pay any costs, because she was proceeding as a poor person, and under the terms of Order XVI., r. 28, "no poor person shall be liable to pay costs to any other party"; but that is not the question at all. What the learned judge has done here has been to do something entirely different from ordering ordinary costs in the action: he has made an order which has the effect, if it stands, of depriving the mortgagee in this case, the appellant with whom we are concerned, of the ordinary rights of a mortgagee. The mortgagee here was compelled to defend her rights, or at least cannot be said to have acted unreasonably in seeking to defend her rights. She was actually impleaded, and it was sought by the originating summons to have her charge set aside and declared invalid.

The position, it may well be, would have been the same for present purposes, had the only attack on the late Mrs. Bergin's title been based on the plea of non est factum or of forgery; in other words, that the conveyance was a mere nullity. But I have to consider an attack in the amended pleadings, impugning the mortgage, and impugning the title of Mrs. Bergin on the ground that the conveyance had been obtained by fraud. In such a case clearly the conveyance was voidable, and innocent third parties can acquire rights under the transferee, notwithstanding the fraud, so long as the conveyance has not been set aside. There was therefore a clear attack on the chargee's rights, the chargee was defending her rights, and on the well-known principle, for which I need only refer to a passage on p. 753 of Fisher and Lightwood's Law of Mortgage and another passage on p. 765, the learned judge had no right to add to his order this declaration or order, which would have the effect of interfering with the mortgagee's ordinary rights to add to the costs of the mortgage, when the question of redemption arose, such costs as she incurred in defending her title in this action.

I think therefore that the appeal ought to succeed. I have not thought it necessary to refer to any of the numerous decisions on this point, because the matter is fairly covered by the general principle; nor do I rely on Order LXV., r. 1,

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which I think is dealing with the costs of a litigation and not with such a matter as the mortgagee's right, which is treated as an incidental or implied term in the mortgage contract, to add expenses such as these to the mortgage security.

The appeal should be allowed.

ROMER L.J. I agree. Where a mortgagee's title is attacked by somebody who is a stranger to the mortgagee, the circumstances in which the mortgagee is entitled to add his proper costs in defending his title to the mortgagee's security are stated by Sir W. Page Wood V.-C. in *Parker v. Watkins* (1), where he said this: "I quite agree that, where a mortgagee, has been put to expense in defending the title to the *estate*, the defence being for the benefit of all parties, he is entitled to charge those expenses against the estate; but if some litigious person chooses to contest his (the mortgagee's) title to the mortgage, that should not affect the parties interested in the equity of redemption, unless they can be shown to have concurred in or assisted the litigation."

In the present case, certainly on one aspect of it, the applicant on the originating summons was alleging that the title of the mortgagor, and of the three mortgagees claiming through the mortgagor was bad, because the alleged transfer from the applicant to the mortgagor made before the date of any of the mortgages was a nullity, was a forgery. That was part of the case that she was putting forward. In such a case obviously the mortgagees were necessary parties. The applicant was asking that the register should be rectified, not only by removing the name of the mortgagor, but removing the name of all the mortgagees. That is an action precisely of the kind which Page Wood V.-C. was referring to as an action which was impeaching the title to the estate where the mortgagee was defending it, not only on his own behalf but on behalf of everybody else who was interested in that estate.

That being so, it is plain that the costs of defending these proceedings properly incurred must be added by the

(1) John. 133, 137.

mortgagee to her security. Then it is said: Oh yes, but the applicant here got leave to sue as a poor person. But Order XVI., r. 28, merely provides that a poor person shall not be ordered to pay any costs; whereas the order sought is one allowing the costs of the mortgagees to be added to their securities. The result of making that order will be that if and when the applicant—she had succeeded in her claim against the mortgagor—comes to redeem the mortgage, she will only be entitled to do so on payment of what is due for principal, interest and costs. I may point out that when the second mortgagee comes to redeem Mr. Archer's client, he will only be entitled to do it on paying principal, interest and costs. Why Order XVI., r. 28, should be said to enure for his benefit so as to entitle him to redeem Mr. Archer's client without paying the costs of these proceedings, I cannot for the life of me understand. If any qualification were to be made in regard to the consequence of Order XVI., r. 28, it surely would be only on the right of the mortgagor, the poor person, to redeem; but in my opinion, Order XVI., r. 28, has no such application, even in the case of the mortgagor being a poor person.

I agree that this appeal must be allowed.

GREENE L.J. I agree.

Order varied.

Solicitors: *Gibson & Weldon; Craigen, Hicks & Co.; T. & N. Blanco White; Coldham, Birkett & Fleuret.*

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[No. 627 of 1936.]

Nov. 27;
Dec. 18.

Bankruptcy—Receiving order—Married woman not carrying on a trade or business—Banking account guaranteed before passing of Law Reform (Married Women and Tortfeasors) Act, 1935—Payment off of amount due to bank by guarantor after passing of Act—Judgment recovered against married woman by guarantor—Time when guarantee took effect—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 1 (d); s. 4, sub-s. 1 (c).

The Law Reform (Married Women and Tortfeasors) Act, 1935, by s. 1 (d) renders a married woman amenable to the bankruptcy laws in all respects as if she were a feme sole, and by s. 4, sub-s. 1, provides that: "Nothing in this Part of this Act shall . . . (c) enable any judgment or order against a married woman in respect of a contract entered into, or debt or obligation incurred before the passing of this Act, to be enforced in bankruptcy or to be enforced otherwise than against her property."

On September 7, 1933, the petitioning creditor guaranteed the banking account of the debtor, a married woman not carrying on a trade or business, up to a limited amount. On August 2, 1935, the Act came into operation. In January, 1936, the bank called on the guarantor to pay under the guarantee and on February 21 the guarantor did so. On May 28 the guarantor obtained judgment against the debtor in respect of the sum so paid. The debtor having failed to comply with a bankruptcy notice issued in respect of this debt the guarantor served her with a bankruptcy petition. The Registrar refused to make a receiving order. On appeal:—

Held, that the implied undertaking of the principal debtor to repay the money paid on her behalf to the bank arose at the time of the guarantee; that the obligation of the guarantor, though for a time at common law inchoate and unenforceable, had its origin in 1933 before the passing of the Act of 1935; that it followed, therefore, that the contract or obligation in respect of which judgment was given existed before the passing of that Act and consequently that the married woman debtor, not being a trader, could not be made bankrupt.

Decision of Mr. Registrar Parton affirmed.

APPEAL from an order of Mr. Registrar Parton refusing to make a receiving order against the debtor, a married woman, not carrying on a trade or business.

On September 7, 1933, the petitioning creditor gave a guarantee to a bank for money borrowed by the debtor. In January, 1936, after the passing of the Law Reform (Married

Women and Tortfeasors) Act, 1935, the debtor made default in payment of the amount borrowed from the bank, and the bank called upon the petitioning creditor to pay under the terms of the guarantee. On February 21, 1936, the petitioning creditor discharged the debt due to the bank and on May 20 she issued a writ against the debtor in respect of the money which had been paid by her as guarantor, claiming 523*l.* 4*s.* 9*d.*, money paid by her for the use of the debtor. The sum claimed was composed as to 470*l.* of the amount owing under the guaranteed account, and the remainder of interest and bank charges. On May 28, 1936, the petitioning creditor obtained judgment by default for this sum together with costs, amounting to some 530*l.* in all. The debtor failed to comply with a bankruptcy notice in respect of this debt, and the question for decision was whether or not, in the circumstances, she could, on the motion of the petitioning creditor, be made a bankrupt. The Registrar refused to make a receiving order against the debtor.

The petitioning creditor appealed. The appeal was heard on November 27, 1936.

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W. A. L. Raeburn for the appellant. The Registrar was wrong in refusing to make the receiving order. The guarantor having paid the debt to the bank under her guarantee on February 21, 1936, her claim to be indemnified arose in respect of an obligation which arose after the coming into operation of the Law Reform (Married Women and Tortfeasors) Act, 1935, and s. 4, sub-s. 1 (c), of that Act does not therefore apply.

[SLESSER L.J. Was not the obligation incurred in 1933 ?]

It is submitted not. The principal debtor might have paid off the liability to the bank, and in that case there would never have been any debt at all: *In re Mitchell*. (1) In *Collinge v. Heywood* (2) it was held that on a contract to indemnify a plaintiff against costs, which he was afterwards called upon to pay, the cause of action arose when he paid, not when the costs were incurred or the attorney's bill delivered to the plaintiff, and therefore that the statute of limitation ran from the time of payment.

(1) [1913] 1 Ch. 201, 207.

(2) (1839) 9 A. & E. 633.

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In *Angrove v. Tippet* (1) it was held that when a party was called upon to pay the debt of another his remedy over against such other ran from the time of actual payment by him and not from the time when he became merely liable to pay.

[GREENE L.J. referred to *Woffington v. Sparks*. (2)]

In re Fenton (3) shows that the right of a surety who has not paid off the debt against the principal debtor is equitable only: see also *In re Richardson*. (4)

G. F. Kingham for the respondent. The obligation of the debtor in this case to indemnify the petitioning creditor was, it is submitted, an obligation incurred by her before the passing of the Act of 1935 within s. 4, sub-s. 1 (c), of that Act, and that being so the fact that this obligation did not ripen into a debt or right of action at law until after the passing of the Act does not take the case out of the operation of the sub-section.

[ROMER L.J. referred to *Exall v. Partridge*. (5)]

Under the saving clause in the Act of 1935 the implied obligation to pay arose at the time the guarantee was given in 1933, which was long before the passing of the Act of 1935.

[He also referred to *Ascherson v. Tredegar Dry Dock and Wharf Co.* (6) and *Dixon v. Steel*. (7)]

Cur. adv. vult.

1936. Dec. 18. SLESSER L.J. read the following judgment:—

This case raises a nice question of law.

Before the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman could only be made bankrupt if she were carrying on a trade or business—Bankruptcy Act, 1914, s. 125—but now, by s. 1 (d) of the 1935 Act, to which I have referred, a married woman is subject to the law relating to bankruptcy in all respects as if she were a

(1) (1865) 11 L. T. 708.

(2) (1754) 2 Ves. Sen. 569.

(3) [1931] 1 Ch. 85, 117.

(4) [1911] 2 K. B. 705, 712.

(5) (1799) 8 T. R. 308.

(6) [1909] 2 Ch. 401, 406.

(7) [1901] 2 Ch. 602.

feme sole. By s. 4, sub-s. 1, however, it is provided that nothing shall “(c) enable any judgment or order against a married woman in respect of a contract entered into, or debt or obligation incurred, before the passing of this Act, to be enforced in bankruptcy or to be enforced otherwise than against her property.”

In the present case, on September 7, 1933, the petitioning creditor had guaranteed money borrowed from the bank by the debtor. In January, 1936, the debtor made default in payment of the amount borrowed from the bank, and the bank called upon the guarantor to pay under the terms of the guarantee. Thereafter, on February 21, the guarantor discharged the debt due to the bank, and on May 20, 1936, issued a writ against the debtor in respect of the money which had been paid by the guarantor, claiming 523*l.* 4*s.* 9*d.*—money paid by the guarantor for the use of the principal. The sum claimed was composed of 470*l.*, the amount owing under the guaranteed account, and, as to the remainder, of interest and bank charges. On May 28, 1936, the guarantor obtained judgment by default for this sum, together with costs, amounting to some £530 in all. The debtor has failed to comply with a bankruptcy notice in respect of this debt, and the matter now to be decided is whether or not, in the circumstances, she can, on the motion of the petitioning creditor—the guarantor—be made a bankrupt.

The answer to this question depends upon whether under the terms of s. 4, sub-s. 1 (c), of the 1935 Act before mentioned, this judgment against the married woman is or is not in respect of a contract entered into or debt or obligation incurred before the passing of the Act, namely, before August 2, 1935; the guarantee, as I have said, having been given in 1933. On the other hand, the date of payment to the bank by the guarantor was February 21, 1936—that is after the passing of the 1935 Act. The neat problem arises whether in these circumstances the judgment of May 28, 1936, was given in respect of a contract entered into or debt or obligation incurred before or after the passing of the 1935 Act?

The guarantee which here must be considered is in the

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C. A. usual form. The surety undertook that she would guarantee
 1936 to the bank payment of, and on demand in writing made,
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In re. from time to time become due from the principal, not exceeding
 Slessor L.J. £500, and on this has to be determined what, in law, is the
 exact nature of the right of the surety against the principal.
 There is no doubt that a surety paying a debt is entitled to
 recover against the principal, as for money paid to his use :
Morrice v. Redwyn (1) ; *Woffington v. Sparks* (2) ; in the words
 of Cozens-Hardy, M.R., in *In re Richardson* (3), " It is settled
 at common law that, given a contract of indemnity, no action
 could be maintained until actual loss had been incurred.
 The common law view was first pay and then come to the
 Court under your agreement to indemnify." This is the basis
 of an implied promise to pay.

As Ashhurst J. says in *Toussaint v. Martinnant* (4), " There
 is no doubt but that wherever a person gives a security, by way
 of indemnity for another, and pays the money, the law
 raises an *assumpsit*." And in the same case Buller J. points
 out that in ancient times no action could be maintained at
 law where a surety had paid the debt of his principal, but
 that now the law raises such a promise where the creditor
 does not choose to take a security.

Parker J. in *In re Mitchell* (5) speaks to the same effect
 when he says : " Until the surety is called upon to pay and
 does pay something under his guarantee, there is no debt or
 right at law at all ; until then a surety's right is confined
 to a right to come into equity in order to get an indemnity
 against his liability to the creditor." But though no question
 arises that there is no enforceable debt at law which can be
 enforced by the surety until the surety, being liable and
 obliged to pay, does pay the creditor (an event which here
 happened after the passing of the 1935 Act), it by no means
 follows that the obligation of the principal does not in appro-
 priate circumstances arise by an implied agreement at the

(1) (1731) 2 Barnard. 26.

(2) 2 Ves. Sen. 569.

(3) [1911] 2 K. B. 705, 709.

(4) (1787) 2 T. R. 100, 104.

(5) [1913] 1 Ch. 201, 206.

time of the giving of the guarantee that the principal, if and when the guarantor is called upon to pay, will indemnify the guarantor, though the event which gives rise to the enforceability of the promise falls later. Such a request may be implied by law from "the fact of entering into the engagement": per Lord Campbell in *Batard v. Hawes*. (1)

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It was always within the power of the Court in equity to declare a right to indemnity by a guarantor even before the guarantor was called upon to make payment where the guarantor's liability to pay had become absolute. He was entitled to maintain an action against the principal debtor and to obtain an order that he should pay off the creditor and relieve the surety; see Cozens-Hardy, M.R., in *In re Richardson* (2), or a declaration that a guarantor was entitled to indemnity could in appropriate cases be obtained.

In the present case the implied undertaking of the principal debtor to repay the money paid on her behalf to the creditor arose at the time of the guarantee. The contract to indemnify is distinguishable from the cause of action (see Littledale J. in *Collinge v. Heywood* (3)). In other cases it may well be that the implied request which supports the action may arise at a later period; it is a question of fact, but here no request has been or can be suggested other than that which arose at the time of the guarantee. The obligation of the guarantor, though for a time at common law inchoate and unenforceable, had its origin in 1933 before the passing of the 1935 Act.

It follows, therefore, that the contract or obligation in respect of which judgment was given existed before the passing of the 1935 Act, and, therefore, that the married woman debtor, not being a trader, cannot be made bankrupt and that this appeal fails.

ROMER L.J. I have had the privilege of reading the judgment which has just been delivered by Slessor L.J. and

(1) (1853) 2 E. & B. 287, 296. (2) [1911] 2 K. B. 705, 709.

(3) 9 A. & E. 633, 640.

C. A. also that about to be delivered by Greene L.J. For the
1936 reasons given in those judgments I agree that this appeal fails
A DEBTOR, and must be dismissed.
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GREENE L.J. By a document in writing dated September 7, 1933, the petitioning creditor guaranteed the debtor's banking account with Barclays Bank up to the sum of £500. Upon the hearing of the petition, the learned Registrar found that this guarantee was given at the request of the debtor, and this finding is not challenged. On February 21, 1936, the petitioning creditor paid the amount then due from the debtor to the Bank as she was bound to do, and on May 28, 1936, she recovered judgment against the debtor in the King's Bench Division for the amount so paid with costs. It is upon this judgment debt that the petition is founded.

The debtor is and was at all material times a married woman. Between the date when the guarantee was given and the date when the petitioning creditor paid the bank, namely, on August 2, 1935, the Law Reform (Married Women and Tortfeasors) Act, 1935, came into force. By s. 1 (*d*) of this Act a married woman is made subject to the bankruptcy law in all respects as if she were a feme sole, but s. 4, sub-s. 1, provides as follows:—"Nothing in this Part of this Act shall . . . (c) enable any judgment or order against a married woman in respect of a contract entered into, or debt or obligation incurred, before the passing of this Act, to be enforced in bankruptcy or to be enforced otherwise than against her property."

It is contended by the debtor that the case is covered by this saving clause in that the judgment was "in respect of a contract entered into or debt or obligation incurred" before the passing of the Act—namely, on September 7, 1933, when the guarantee was given. It is contended by the petitioning creditor, on the other hand, that the relevant date is the date of payment to the bank—namely, February 21, 1936. The learned Registrar held that the debtor's contention was well-founded upon the ground as stated by him "that immediately a surety assumes liability to a creditor

under a guarantee entered into by him at the request of the principal debtor, an obligation to indemnify the surety is incurred by the principal debtor."

I will state my reasons for agreeing with the decision of the learned Registrar. It is, in my opinion, settled beyond possibility of dispute that where "A" at the request of "B" guarantees payment of "B's" debt to "C," the law implies an undertaking by "B" to indemnify "A" in respect of any sums which he properly pays to "C" under the guarantee. This is merely a branch of a wider rule which is laid down in numerous authorities. I may quote as examples *Brittain v. Lloyd* (1), where Pollock C.B. says, "It is clear, that, if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying from him at whose request it is paid, and may be recovered on a count for money paid The request to pay, and the payment according to it, constitute the debt ; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference" ; and *Batard v. Hawes* (2), where Lord Campbell said, "To support the action for money paid, it is necessary that there should be a request from the defendant to pay, either express or implied by law. Where one party enters into a legal liability for and at the request of another, a request to pay the money is implied by law from the fact of entering into the engagement ; and, if the debt or liability is incurred entirely for a principal, the surety, being liable for him at his request, and being obliged to pay, is held at law to pay on an implied request from the principal that he will do so" : see also notes to *Lamplough v. Brathwait*. (3)

Now it is said in the present case, and said truly, that until the petitioning creditor had paid the bank no debt became due to her from the debtor. But this is beside the point. The implied undertaking to indemnify is an undertaking to

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(1) (1845) 14 M. & W. 762, 773. (2) 2 E. & B. 287, 296.

(3) 1 Sm. L. C., 13th ed., 155 et seq.

C. A. reimburse the guarantor upon the happening of a contingency, viz., the payment by the guarantor to the creditor, and until 1936 that contingency happens there is no debt. But the question A DEBTOR, *In re.* here is, "When was the contract entered into, or the debt or obligation incurred, in respect of which the judgment was obtained?" The only answer to this question (apart from the actual debt), in my opinion, is when the implied undertaking to indemnify was given, and this was at the date of the request. To quote again the words of Pollock C.B. in speaking of the general rule, "The request to pay, and the payment according to it, constitute the debt." In the case where the request is to enter into an obligation, the request to pay is implied from the fact of entering into the obligation. This appears from the passage already cited from *Batard v. Hawes* (1), a case which brings out the point in a particularly neat manner. Twelve gentlemen, including the plaintiff, became co-guarantors. The plaintiff had been compelled to pay the whole debt and he sued the defendant, one of the other eleven, for contribution. Two of the co-guarantors died before the payment by the plaintiff. The question which arose for decision was whether the defendant was liable to contribute one-twelfth or one-tenth of the amount which the plaintiff had paid. It was held that the liability was to contribute one-twelfth only. Lord Campbell puts the point (2): "If the right to contribution is to be considered as arising merely from the fact of payment being made, so as to relieve a party jointly liable from legal liability, we should have to look to the number of co-contractors actually liable at law at the time of making the payment which relieved them from liability. But we think that it is not merely the legal liability to the creditor at the time of the payment that we are to regard, but that we must look to the implied engagement of each, to pay his share, arising out of the joint contract when entered into." Then follows the passage which I have already quoted, and the learned Chief Justice proceeds, "In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt, consisting of the shares which each

(1) 2 E. & B. 289.

(2) Ibid. 296.

co-contractor ought to pay as between themselves; and each, in effect, takes upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his co-contractors at the request of such co-contractor; and, on being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it, and who is relieved from paying what, as between himself and the party who pays, he ought himself to have paid according to the original arrangement." The rule as to the right of contribution among co-sureties laid down in this case which was a case at law, is, of course, no longer to be followed for the reason that equitable principles are now applicable in all Courts, and these are based in this matter of contribution, not on the terms of the contract implied between the co-sureties, but upon equitable considerations. But the case is in my opinion still an authority for the proposition that where an obligation is entered into on request, the ultimate payment made in pursuance of that obligation is to be referred to the original request and the rights of the parties determined accordingly. The position of co-sureties inter se and the position of a single surety giving a guarantee at the request of the principal debtor are treated in the case as being the same from the point of view of the contractual obligations to be implied from the entry into the obligation.

I should myself have thought that, once the contractual basis of the relationship is appreciated, the question raised in this appeal would only admit of one answer. But I have thought it right to refer to the authorities above cited in view of an argument which was addressed to us of this nature. It was said that the claim in the action was a claim for money paid and that it was competent to the petitioning creditor to frame her claim in this way without reference to any implied obligation to indemnify. It is true that in the old form of pleading an action of indebitatus assumpsit was a proper form of action in such a case, and it was with actions of this nature that the two cases to which I have referred were concerned. But it was of the essence of the claim that the

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C. A. payment was made on request (see 1 Sm. L. C. 13th ed., at
 1936 p. 155). Now where, as in the present case, the implied
 A DEBTOR, request for payment is referable to a request to give a guar-
In re. antee, the contractual basis of the action is apparent, and the
 Greene L.J. difference between the old form of action of indebitatus
 assumpsit and an action on a special contract to indemnify
 disappears for all practical purposes. The question whether
 or not the sub-section applies cannot, in my opinion, be
 affected by the fact that it would have been open to the
 plaintiff to bring his action on an indebitatus assumpsit
 instead of declaring on the implied undertaking to indemnify.
 (Cf. *Crampton v. Walker* (1), and *Hamilton v. Gould*. (2)) A
 question may arise as to the application of the sub-section
 in a case where a guarantee is given without any antecedent
 request on the part of the debtor. That case is merely one
 example of a number of cases where the law raises an obligation
 to indemnify irrespective of any actual antecedent contractual
 relationship between the parties. A quite recent example of
 a case where the law raises such an obligation irrespective of
 antecedent contract is to be found in a case decided in this
 Court of *Brook's Wharf and Bull Wharf, Ltd. v. Goodman*
Brothers. (3) Where a guarantee of a married woman's debt
 is given before the Act without any request from her, and
 the payment which gives rise to the obligation to indemnify
 is made after the Act, it might be argued that the obligation
 was not incurred before the passing of the Act. But that is
 not this case, and I express no opinion upon it. In this case
 the guarantee having been given at the request of the debtor,
 I am clear that the judgment was one in respect of a contract
 entered into and an obligation incurred before the passing of
 the Act, and I agree that the appeal should be dismissed with
 costs.

Appeal dismissed.

Solicitors for appellant : *W. P. Davies & Son.*

Solicitor for respondent : *A. E. Sutton.*

W. I. C.

(1) (1860) 3 El. & El. 321.

(2) (1839) 1 Ir. L. R. 171.

(3) [1936] W. N. 331.

WILLOUGHBY v. ECKSTEIN.

LUXMOORE

J.

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Oct. 16 ;

Dec. 18.

[1935 : W. 2402.]

Light—Prescription—Lease reserving right to lessor to rebuild so as to obstruct light—Claim by lessee against another lessee of adjoining premises held under same lessor—Agreement or consent in writing—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.

The plaintiff and defendant were lessees of adjoining premises under leases granted by a common landlord. The defendant having, as the plaintiff alleged, so rebuilt and altered his premises as to constitute a nuisance or illegal obstruction to certain of the plaintiff's windows, the plaintiff commenced an action for an order (inter alia) directing the defendant to pull down so much of the buildings erected by him as caused the nuisance or illegal obstruction complained of.

Subsequently a question was raised as a point of law in the defence and brought before the Court upon an agreed statement of facts whether the access of light to the windows of the plaintiff's premises was enjoyed by consent or agreement expressly given for that purpose by deed or writing within the Prescription Act, 1832, s. 3. In the lease under which the plaintiff acquired the premises rights of light or other easements over other premises were expressly excluded, and the lease was subject to all rights and easements belonging to adjacent property and to the adjacent buildings or any of them being at any time rebuilt or altered according to plans as to height, elevation, extent or otherwise as might be approved by the ground landlord :—

Held, that the exception from the lease to the plaintiff of any right to light coupled with the right expressly reserved for the adjacent buildings to be rebuilt constituted a grant by the lessee to the lessor of the right to build during the term of the lease on the adjacent land (including the defendant's premises), notwithstanding the effect of such rebuilding on the light to the plaintiff's premises, and constituted an agreement by the plaintiff that any enjoyment of light to her premises was throughout her lease permissive only.

There was therefore a sufficient agreement or consent in writing relating to the enjoyment of light to the plaintiff's premises to satisfy the proviso to s. 3 of the Prescription Act, 1832, and to prevent the plaintiff acquiring any statutory right to light under the section.

THE following statement of facts is substantially taken from the judgment of the learned judge :—

The plaintiff is the lessee of No. 13 Balfour Mews, Aldford Street, in the City of Westminster, and the defendant is the lessee

LUXMOORE of the adjoining premises, No. 15 Balfour Mews. On July 29, 1935, the plaintiff issued a writ claiming among other relief an order directing the defendant to pull down so much of a building recently erected by him on his premises as causes a nuisance or illegal obstruction to certain of the windows of 13 Balfour Mews. Pleadings were delivered in the action in due course. On June 25, 1936, an order was made directing that a point of law raised by the defence should be set down for argument. The point of law is: "Whether upon the facts appearing in the statement of facts agreed between the parties . . . the access of light to the windows of the plaintiff's premises . . . has been enjoyed by a consent or agreement expressly made or given for that purpose by deed or writing within the meaning of s. 3 of the Prescription Act, 1832."

It appears from the statement of facts that the plaintiff is the lessee of No. 13 Balfour Mews under a lease dated August 29, 1899, granted by the then Duke of Westminster and that the defendant is the lessee of No. 15 Balfour Mews under a lease originally granted in 1897 by the same lessor. This lease, which was dated December 25, 1897, was surrendered on December 3, 1934, and a fresh lease granted by the lessor dated December 4, 1934. Some of the windows in the plaintiff's premises face No. 15 Balfour Mews. None of these windows has been altered since the lease of August 29, 1899, was granted, nor was there any alteration in the buildings comprised in the lease of No. 15 Balfour Mews until January, 1934. In that month the defendant commenced to rebuild No. 15 Balfour Mews. The new building was completed before December 3, 1934, and was raised to a greater height than the original building, with the result that the windows in No. 13 Balfour Mews have been obstructed.

R. F. Roxburgh K.C. and *L. W. Byrne* for the plaintiff, opened the case and stated the facts.

Gavin Simonds K.C. and *G. A. Rink* for the defendant on the point of law. By the lease dated August 29, 1899, any right of light to the property demised over other property was expressly excepted out of the demise; there was also

reserved the right for the adjacent buildings to be rebuilt and altered as to height. The question is, What is the effect of s. 3 of the Prescription Act, 1832, on the rights of the parties, and how are they affected by the words in the proviso to that section? See the remarks of Cotton L.J. and Lindley L.J. in *Mitchell v. Cantrill* (1), and see also *Haynes v. King* (2), which latter case, it is submitted, covers that now before the Court: see also *Foster v. Lyons & Co., Ltd.* (3), where the deed in question was held to be an agreement expressly made within the section.

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The question of law asked should be answered by saying that any access of light to the plaintiff's premises has only been enjoyed by mere permission of the landlord, and the plaintiff has no rights under the statute.

Roxburgh K.C. for the plaintiff. In all the three cases cited on behalf of the defendant the right was expressly granted. In the case now before the Court the document in question, namely, the lease of August 29, 1899, did not grant any right either expressly or otherwise, though it did exclude it. This therefore does not assist the defendant. The plaintiff's rights to light are statutory rights: see Eve J.'s judgment in *Foster v. Lyons & Co., Ltd.* (4) To satisfy the statute, there must be some document in writing which expressly confers on a lessee such a right. *Mitchell v. Cantrill* (1) somewhat assists the plaintiff: see the remarks of Cotton L.J. in his judgment and also those of Lindley L.J.

Gavin Simonds K.C. in reply. The instrument under which the de facto lessee has enjoyed the right to light must be first taken into consideration, and it must be ascertained whether this right was enjoyed under some agreement given for the purpose. In the case now before the Court no express right to light was given, but, being merely permissive during the lease, it is submitted that this lease is a document within the words of the proviso to s. 3. On the true construction of this document there is an agreement between

(1) (1887) 37 Ch. D. 56, 59,
60, 62.

(2) [1893] 3 Ch. 439.

(3) [1927] 1 Ch. 219, 228.

(4) *Ibid.* 219, 227.

LUXMOORE the lessor landlord and the plaintiff lessee regulating their
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Cur. adv. vult.

1936. Dec. 18. LUXMOORE J., after stating the facts substantially as set out above, continued: The statement of facts discloses certain other facts which are not material to the question directed to be argued. It also contains an allegation that the obstruction of the plaintiff's windows has caused a nuisance or illegal obstruction. There is no admission by the defendant with regard to this allegation, but for the purpose of determining the question directed to be argued, and for no other purpose, I assume that the nuisance or illegal obstruction alleged exists. The plaintiff claims a right to the access of light to the windows referred to as the same was enjoyed before the defendant's building operations were begun in January, 1934. She claims that right under s. 3 of the Prescription Act, and on no other ground. That section provides: "When the access and use of light to and for any dwelling house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing."

It is settled law that, in the absence of any agreement excluding the operation of the Prescription Act, where two tenements are held by different lessees under a common landlord and one lessee has enjoyed the access and use of light in respect of his tenement over the other tenement without interruption, that lessee acquires an absolute and indefeasible right to light as against the other tenement; and that the right enures in favour of that lessee and his successors, not only as against the other lessee but also against the common landlord and all succeeding owners of the other tenement: see *Morgan v. Fear*. (1)

On the facts stated the access and use of light to the windows referred to was enjoyed for the full statutory period before the defendant's building operations began, and therefore, having regard to the decision in *Morgan v. Fear* (1) this enjoyment has conferred on the plaintiff in the present case a statutory right to light in respect of the windows referred to unless the exception at the end of the section applies so as to prevent the acquisition of the statutory right. It is to be observed that the exception to be operative must fulfil three conditions: (a) the agreement must be by deed or writing, (b) it must be express, and (c) it must also have been entered into for the purpose referred to in the section. There is no difficulty with regard to (a) and (b). The real difficulty appears to me to arise on (c). The purpose referred to in the exception to the section is described in the section as "that purpose." The section has been considered by the Court of Appeal in *Mitchell v. Cantrill* (2); by North J. in *Haynes v. King* (3); and by Eve J. in *Foster v. Lyons & Co., Ltd.* (4). In *Mitchell v. Cantrill* (2) Lindley L.J. said: "The last words in the section mean that when you find an agreement under which the light is enjoyed you must look at that agreement and see what, if any, right to light is expressly given by it." Cotton L.J. said that if you find "an express proviso in the contract, between the parties that, notwithstanding the grant to the plaintiff,"—that is the person claiming to have acquired a statutory right to light—"the landlord"—that is the person against whose property the statutory right was claimed to have been acquired—"should be at liberty to build so as to interfere with his right, that would be another point." It was argued on behalf of the plaintiff that the word "right" was used deliberately and that therefore the case decides that the proviso in the section only covers cases where the claimant to a statutory right to light has a right to light conferred on him by the grant, and that this view is supported by the passage I have already read from the judgment of Lindley L.J. It appears to me that the word "right" is not

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(1) [1907] A. C. 425.

(2) 37 Ch. D. 56, 60, 62.

(3) [1893] 3 Ch. 439.

(4) [1927] 1 Ch. 219.

LUXMOORE used in the passages I have referred to as meaning a contractual right to light in the narrow sense, but is used in the wider sense of a permissive enjoyment regulated by agreement between the persons concerned. In *Mitchell v. Cantrill* (1) the demise was of a particular plot of land "with all rights and appurtenances, legal, used, or reputed, to the said plot of land, except rights, if any, restricting the free use of any adjoining land or the conversion or appropriation at any time thereafter of such land for building or other purposes, obstructive or otherwise." The Court of Appeal held that these words could not be construed as an agreement for the enjoyment of light but must be construed as "an exception out of the grant made of appurtenances and rights, so as to prevent the lessee from urging as against the landlord or anybody claiming through him, before a right had been obtained under the statute, that the landlord could not derogate from his own grant either by his building or granting any one else a right to build so as to interfere with the plaintiff's lights."

In *Haynes v. King* (2) the plaintiff's lease contained a provision that "notwithstanding anything herein contained, the said lessors shall have power, without obtaining any consent from or making any compensation to the said lessee, to deal as they may think fit with any of the premises adjoining or contiguous to the hereditaments hereby demised, and to erect or suffer to be erected on such adjoining or contiguous premises any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now, or at any time during the term hereby granted, be enjoyed by the lessee or the tenants or occupiers of the hereditaments hereby demised." North J. held that this constituted an agreement within s. 3 of the Prescription Act sufficient to prevent the acquisition of any statutory right to light thereunder. The foundation of his decision was that the demise in the absence of the particular provision would have passed the right to enjoy all the light coming to the windows of the premises demised at its date, and he held that the

(1) 37 Ch. D. 56, 59, 60.

(2) [1893] 3 Ch. 439, 442.

provision must be construed as an express agreement that the enjoyment of light by the lessee under the demise of the premises was to exist only until the lessors should require to exercise the right expressly given to them by the provision.

In *Foster v. Lyons & Co., Ltd.* (1), the parcels in the lease contained these words: "reserving nevertheless to the lessor, and his lessees and tenants, full right to build to any height upon the land adjoining the premises hereby demised, notwithstanding such buildings may obstruct any light on the land hereby demised." Eve J. said (1): "The question is whether the words I have just read operate as an agreement within the section or were only meant to negative the implied right which the lessee would otherwise have had of insisting that the lessor should not derogate from his own grant by building on the adjoining land—in other words, does the case fall within the decision in *Haynes v. King* (2) or that in *Mitchell v. Cantrill*." (3) The learned judge pointed out that apart from the words referred to, the lessee would have been entitled to the continued enjoyment of the light actually enjoyed over the lessor's land at the date of the demise, and held that the material provision must be construed as a grant by the lessee to the lessor of the full right to build on his adjoining land notwithstanding the injury to light which might result from so doing, and that it could not be cut down to a period of twenty years from the date of the lease.

I think the principle to be deduced from these decisions is that in order to prevent the acquisition of a statutory right to light under the Prescription Act there must be an express written agreement under which the actual enjoyment of light by a lessee is permissive throughout the whole of the term created by the lease. In the present case the parcels in the lease of August 29, 1899, contain words which confer on the lessee certain rights of way and user over Balfour Mews. These words are followed by a clause in the following terms: "but without including any rights of light or other easements over other ground or premises and subject nevertheless to all

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(1) [1927] 1 Ch. 219, 227.

(2) [1893] 3 Ch. 439.

(3) 37 Ch. D. 56.

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rights and easements belonging to any adjacent property and subject to the adjacent buildings or any of them being at any time or times rebuilt or altered according to plans both as to height elevation extent and otherwise as shall or may be approved of by the ground landlord for the time being." The habendum is expressed to be subject to this provision. The lease contains a covenant by the lessee not to make any alteration in the construction, height or elevation of the demised premises without the previous written consent of the landlord. It is to be observed that there is in this lease an express exception out of the demise of any right to light in respect of the demised premises, a feature which is not present in any of the cases cited.

Having regard to the fact that the lessor was the owner of No. 13 Balfour Mews and the owner of the reversion of No. 15 Balfour Mews, which he had already originally leased in December, 1897, the lessor himself had no easement of light in respect of No. 13 and was not in a position to grant any such easement affecting No. 15 Balfour Mews. The exception from the demise of any right to light over the last mentioned property seems to me to establish that there was an agreement between the lessor and lessee that the lessee was to have no absolute right to light under the lease. The exception is followed by these words: "Subject to the adjacent buildings or any of them being at any time or times rebuilt or altered according to plans as to height elevation extent and otherwise . . . approved of by the ground landlord." Taken in conjunction with the exception they appear to me to constitute a grant by the lessee to the lessor of the right to build during the full term of the demise on the adjacent land including No. 15 Balfour Mews, notwithstanding the effect of such building on the light to No. 13 Balfour Mews; and to constitute, together with the exception from the demise of any right to light, an agreement by the lessee of No. 13 Balfour Mews that any enjoyment of light in respect of the premises demised to her was to be permissive only throughout the whole of the term.

I therefore hold that there is a sufficient agreement or

consent in writing relating to the enjoyment of light in respect of No. 13, Balfour Mews to satisfy the requirements of the proviso to s. 3 of the Prescription Act, 1832, and to prevent the acquisition by the plaintiff of any statutory right to light under that section.

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Solicitors : *Burton, Yeates & Hart ; Holmes, Son & Pott.*

A. R. T.

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Jan. 15.

In re LIBERTY'S WILL TRUSTS.

BLACKMORE *v.* STEWART LIBERTY.

[1936. L. 1962.]

Settled Land—Tenant for life—Equitable life interest defeasible on alienation—Improvements—Cost of improvements out of capital moneys—Repayment by instalments—Rentcharge on income created by tenant for life in favour of trustees to secure instalments—Life interest not thereby vested in trustees—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 85; Third Schedule.

By s. 85, sub-s. 1, of the Settled Land Act, 1925: "When the tenant for life is required by the trustees to repay by instalments the capital money expended, . . . the tenant for life is by this section authorised to create out of the settled land, . . . a yearly rentcharge in favour of the trustees of the settlement sufficient in amount to discharge the said half-yearly instalments."

A tenant for life with a life interest defeasible on alienation carried out improvements in the principal mansion house. The Settled Land Act trustees agreed to discharge the cost out of capital moneys, and required him to execute, under s. 85, a deed creating a rentcharge to secure repayment of the cost to capital, which he did.

On a summons to determine whether, if some of the improvements were not within the Act, so that more had been spent on improvements and a larger rentcharge created than the Act authorized, the defeasible interest of the tenant for life ceased on the execution of the deed:—

Held, that the trust giving to the tenant for life a life interest defeasible on alienation did not cease upon the execution of the deed.

ADJOURNED SUMMONS.

By his will dated November 19, 1915, Sir Arthur Lazenby Liberty (hereinafter called "the testator") provided: "I devise all my freehold estates . . . not hereby otherwise disposed of (hereinafter referred to as 'the settled freeholds') to my trustees . . . in trust for my . . . wife . . . during her life . . . and after her death Upon trust that if . . . no act or event shall have happened whether before or after my decease whereby the equitable life interest hereby given to my nephew Ivor Stewart Liberty or any part thereof

if belonging to him absolutely would have become vested in or charged in favour of some other person or persons or a Corporation then my trustees shall permit my said nephew Ivor Stewart Liberty to enter into and remain in the possession or the receipt of the rents and profits of the settled freeholds during his life or until some such act or event as aforesaid shall happen”

Clause 13 of the will provided that after the failure or determination during the lifetime of Ivor Stewart Liberty (hereinafter called the tenant for life) of his equitable life interest in the settled freeholds the trustees should enter into the possession or receipt of the rents and profits thereof and should, during the remainder of his life, continue in possession or receipt and manage or superintend the management thereof as therein mentioned, and hold the net rents and profits thereof upon the discretionary trusts in the clause mentioned for the benefit (in the events which happened) of all or any one or more of the tenant for life, his wife and children or remoter issue for the time being in existence, and, subject to the said discretionary trusts, as if the tenant for life had then been dead.

The testator died on May 11, 1917; his will was proved on September 14, 1917. His wife died on May 2, 1920.

By a vesting deed dated January 27, 1926, and made between the then trustees of the will and the tenant for life, the settled freeholds were vested in the tenant for life, pursuant to the provisions of the Settled Land Act, 1925, upon the trusts of the will.

In 1934, the tenant for life carried out certain improvements in the principal mansion house on the settled freeholds. It was agreed that the cost of them should be discharged by the trustees out of capital moneys in their hands, and that the repayment of the costs should be secured by the execution by the tenant for life of a deed creating in favour of the trustees a rentcharge upon the income of the settled freeholds. The costs of the improvements came to 153*l.* 3*s.* 5*d.*: and, by the deed, dated January 19, 1935, and made between the tenant for life and the trustees, the tenant for life, by virtue

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of the power contained in s. 85 of the Settled Land Act, 1925, granted to the trustees a yearly rentcharge of 153*l.* 16*s.* 4*d.* payable by twenty half-yearly instalments charged upon and issuing out of the settled freeholds.

Doubts having arisen, on the ground that some of the improvements might not or did not come within Part II. or Part III. of the Third Schedule to the Settled Land Act, 1925, whether a larger amount of capital money had not been spent, and a larger rentcharge created, than were authorized by the Act, this summons was taken out on October 3, 1936, by the trustees, to determine whether or not the trust in the will to permit the tenant for life to remain in possession or receipt of the rents and profits of the settled freeholds ceased upon the execution of the deed of January 19, 1935. -

D. Ll. Jenkins for the trustees.

J. H. Stamp for the tenant for life and remaindermen of full age.

H. S. G. Buckmaster for infant remaindermen.

CLAUSON J. The will is, for the purposes of the present case, a simple one. It settles certain freeholds upon the usual trusts for a tenant for life and various persons in succession, but it contains a clause cutting down the tenant for life's interest to what is commonly known as a life interest defeasible on alienation. The clause is in the following terms : [His Lordship read it and continued :]

It is suggested that an event has happened whereby the equitable life interest given by the will to the tenant for life has become vested in or charged in favour of some other person. Certain improvements were made and, taking the view that they were improvements which the tenant for life was by the settlement authorized to make, the trustees thought it proper to allow them to be paid for out of capital moneys on the terms, provided for by s. 85 of the Settled Land Act, 1925, that the money should be replaced by the tenant for life creating out of the settled property a yearly rentcharge in favour of the trustees. But it is now suggested

that a larger amount of capital money has been spent in making improvements than is authorized by the Act, because some of the improvements (so it is said) are not improvements included within Part II. or Part III. of the Third Schedule to the Act. If that be so, it is conceivable that at some time some one may have a claim on the trustees in respect of a misapplication of some part of the capital moneys : but the fact remains that they have advanced certain capital moneys in respect of which the tenant for life has been required to execute, under s. 85, a document creating a rentcharge.

Let me assume that 500*l.* has been raised out of the settled land and spent on improvements, 400*l.* properly and the other 100*l.* improperly, and that a rentcharge has been created to replace 500*l.* It may be that it was right to execute a rentcharge of only four-fifths of the amount for which it was actually executed, so as to replace 400*l.* only, and that it was wrong that a rentcharge should be created so large as to replace the whole 500*l.* If that be so, some one some day may claim that, in respect of that rentcharge, the whole amount for which it was created would not be recoverable, but only four-fifths of that amount. I cannot bring myself to feel any doubt but that, if the sum paid out of capital was the proper sum and could be justified under the Act and the correct rentcharge was created, the action of the tenant for life has not had the result of vesting in, or charging in favour of, some other person, his equitable life interest. No such vesting and no such charge have occurred. It is true that the creation of the rentcharge has had the effect of diminishing the value of the income in which the tenant for life has an equitable interest ; but that is quite a different thing from vesting his equitable life interest in the Settled Land Act trustees or charging it in their favour.

Let me now suppose that the amount raised was only partly authorized and that the rentcharge should have been smaller : the effect may well be that, in so far as the Act did not, in the circumstances, authorize the creation of such a large rentcharge as has been created, the rentcharge is valid and effectual only to a limited figure ; but I cannot see how

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CLAUSON J. that circumstance can be treated as operating to vest in the trustees or to charge in their favour any part of the tenant for life's equitable estate. It is quite true that in the deed creating the rentcharge the tenant for life has in fact undertaken that while he is tenant for life he will see that the rentcharge is paid: but that undertaking does not vest anything in the trustees, or charge anything in their favour. In my view it is clear that the trust in the will giving to the tenant for life a life interest defeasible on alienation did not cease upon the execution of the deed creating the rentcharge.

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Solicitors for all parties : *Ranger, Burton & Frost.*

K. R. A. H.

In re A DEBTOR.

[No. 231 of 1936.]

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Nov. 13.

Bankruptcy—Receiving Order—Moneylenders' petition—Claim for principal and 5 per cent. interest—Postponed interest—Tender by debtor of principal and 5 per cent. interest but not postponed interest—Jurisdiction to make Receiving Order—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 4, sub-s. 1; s. 5, sub-s. 3—Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 9, sub-s. 1.

By the Moneylenders Act, 1927, s. 9, sub-s. 1: "Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest shall, for the purposes of the provisions of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangement, and dividend, be calculated at a rate not exceeding five per cent. per annum, but nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled."

Petitioners, who were moneylenders, presented a bankruptcy petition against the debtor. In their petition the claim was stated to be in respect of specified sums due on two promissory notes and interest at 5 per cent. The claim further stated "and we also have a claim for interest on the said two promissory notes which is postponed interest under s. 9, sub-s. 1, of the Moneylenders Act, 1927." On the petition coming before the Registrar the debtor tendered to the petitioning creditors the principal due on the promissory notes with 5 per cent. interest but not the postponed interest. This tender was refused, and the Registrar made a receiving order against the debtor. On appeal:—

Held, that under s. 9, sub-s. 1, of the Act of 1927 the right of a moneylender to recover interest in excess of 5 per cent. was not destroyed but merely postponed for the purposes mentioned in the sub-section. The tender made by the debtor did not include the whole sum which the moneylenders might ultimately recover, as it did not include the postponed interest which they might receive in the event of the other creditors being paid in full. They were therefore justified in refusing the tender and the receiving order was rightly made.

APPEAL by the debtor from a receiving order made by Mr. Registrar Parton.

The petitioning creditors, who were moneylenders, in their petition stated their debt in the following terms: "54*l.* 13*s.* 10*d.* being 237*l.* 18*s.* 3*d.* balance of 250*l.* principal moneys advanced by us to the debtor on October 22, 1935,

C. A. upon his promissory note for 250*l.*, and as to 1*l.* 17*s.* 3*d.* interest at 5 per cent. on 237*l.* 18*s.* 3*d.* from January 20, 1936, to the date of the act of bankruptcy. Judgment was obtained against the debtor in the King's Bench Division on March 4, 1936, for 180*l.*, part of the principal sum advanced on the said note, and the debtor obtained leave to defend as to the balance, and as to 300*l.* principal money advanced by us to the debtor on January 7, 1936, on his promissory note in our favour, and as to 2*l.* 18*s.* 4*d.* interest at 5 per cent. from January 7, 1936, to the date of the act of bankruptcy. We also have a claim for interest on the said two promissory notes which is postponed interest under s. 9, sub-s. 1, of the Moneylenders Act, 1927, for the sum of 129*l.* 6*s.* 2*d.*, being as to 89*l.* 13*s.* 6*d.* due in respect of the first promissory note, and as to 39*l.* 12*s.* 8*d.* due in respect of the second promissory note, after the deduction of the interest of 5 per cent. per annum."

On the petition coming on before the Registrar, Tindale Davis, on behalf of the debtor, tendered out of money provided by another person the full amount of the principal claimed together with 5 per cent. interest and costs. This tender was refused by the petitioning creditors; and the Registrar, notwithstanding the contention that in the circumstances the petition ought to be dismissed, made a receiving order.

The debtor appealed. The appeal was heard on November 18, 1936.

Tindale Davis for the appellant. The Registrar was wrong in refusing to dismiss the petition. The effect of sub-s. 1 of s. 9 of the Moneylenders Act, 1927 (1), is to preclude a

(1) Moneylenders Act, 1927, s. 9, sub-s. 1: "Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest shall, for the purposes of the provisions of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrange-

ment, and dividend, be calculated at a rate not exceeding five per cent. per annum, but nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled."

moneylender from claiming by his petition more than the full amount of his debt together with 5 per cent. interest and costs. That is the only sum for which he is entitled to present his petition. That sum the debtor has tendered in the present case and it has been refused by the petitioning creditors. The substratum of the petition having therefore gone the Registrar ought to have refused to make a receiving order.

Under the sub-section the postponed interest was not owing to the petitioning creditors for the purposes of the presentation of the petition.

Wallington K.C. and *Cyril Salmon* for the respondents were not called upon.

SLESSER L.J. This case, which has been argued by Mr. Tindale Davis with his usual fairness and lucidity, raises a question of some importance under the Moneylenders Act, 1927, with regard to the right of moneylenders in bankruptcy, proceedings against their debtor. The facts of the case, so far as they are material, are these. There was admittedly owing at the time of the bankruptcy petition to the moneylenders certain sums, the amount of which I need not state, including interest at 5 per cent. per annum, and in addition certain further interest was due beyond the 5 per cent. claim. When the petition was presented it first set out the sums due under a certain promissory note together with interest at 5 per cent., and then added another sum due under another promissory note, which had not actually fallen due at the date of the petition, with interest. Then followed these words: "And we also have a claim for interest on the said two promissory notes which is postponed interest under s. 9, sub-s. 1, of the Moneylenders Act, 1927," for a certain sum.

When the matter came before the learned Registrar, Mr. Tindale Davis, on behalf of his client, tendered all the moneys due which could properly be claimed on the petition under the Moneylenders Act, 1927, s. 9, sub-s. 1—that is, the sum due together with interest at a rate not exceeding 5 per cent. per annum; but Mr. Davis concedes that, altogether

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C. A. apart from the Moneylenders Act, 1927, and the Bankruptcy
1936 Act, 1914, there was under the promissory notes further interest
A DEBTOR, due which may or may not have been all recoverable. Some
In re. of it might ultimately be decided to be more than was
Slessor L.J. recoverable as being more than 48 per cent.; but still, he
 does concede that there was something due beyond the sum
 which he tendered.

The learned Registrar, in accordance with the Bankruptcy Act, 1914, s. 5, sub-s. 3, duly considered whether for sufficient cause he ought to dismiss the petition, and he came to the conclusion that he would not dismiss the petition. In coming to that conclusion he had regard, as I read his judgment, among other things to the fact that there was a sum of money due for interest over and above the amount of the principal and the interest at 5 per cent. which Mr. Tindale Davis had tendered in discharge of his liability.

The question which we have to consider is whether the Moneylenders Act, 1927, s. 9, sub-s. 1, is such that in the circumstances it can be said that Mr. Tindale Davis has tendered all that is due, and that therefore there was sufficient cause for dismissing the petition. In my view, it is impossible to arrive at that conclusion. It will be observed, in the first place, that s. 9, sub-s. 1, provides that "Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest shall, for the purposes of the provisions of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition . . . be calculated at a rate not exceeding five per cent. per annum, but nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled." That is to say that, for the purposes relating to the presentation of a bankruptcy petition, the amount in question must not be more than the amount owing and 5 per cent., but that there is still preserved to the moneylender in the circumstances stated in the sub-section—namely, after all the debts proved in the estate have been paid in full—the right to receive in

the bankruptcy proceedings any higher rate of interest to which he may be entitled.

In my view, that section relating to the presentation of the bankruptcy petition is dealing with the provision of the Bankruptcy Act, 1914, s. 4, which states that "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—(a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds." In computing that fifty pounds I think s. 9, sub-s. 1, would have the effect that it would not be possible to arrive at the figure of fifty pounds by utilizing by way of interest more than the 5 per cent. per annum. Sect. 9, sub-s. 1, so far as it relates to the presentation of a bankruptcy petition, has that effect, and if it had any other effect it would be an effect which might operate upon other conditions under s. 4, being conditions on which a creditor may petition.

When, however, we come to s. 5, which deals with the proceedings on the creditor's petition, we are dealing with a different subject-matter. That is to say, the petition being properly before the Court, the position is just the same as it would have been apart from the Moneylenders Act, 1927, s. 9, sub-s. 1, and, among other things, the Court has preserved to it the discretion which it has to dismiss the petition on sufficient cause. In this case I think that the learned Registrar was entitled to come to the conclusion that there was no sufficient cause for the dismissal of the petition, because there was a sum of money admittedly owing from the debtor to the moneylenders over and above the sum which was stated—namely, the sum stated in the petition but which need not have been so stated—the sum of postponed interest. That sum was in law owing by the debtor to the moneylenders, and in the event of the debts proved in the estate having been paid in full they would have been entitled in the bankruptcy proceedings to that sum. The mere fact that they could not include it in the quantum which would enable them to bring a petition does not seem to me to prevent it being said that

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C. A. it was part of the debt owing to them recoverable in bankruptcy proceedings, as in any other proceedings, so far as it was possible to recover it under s. 9. Therefore I come to the conclusion that the learned Registrar was entitled to refuse to dismiss the petition on the ground that the sum tendered was not the whole of the sum recoverable in the bankruptcy matter. Whether, if it had been the whole sum, he could or could not have exercised his discretion in this case does not seem to me here to arise. The authorities seem to indicate that even when the whole sum is tendered there is no obligation necessarily on the Registrar to dismiss the petition. It is a matter for him whether there is sufficient cause, but that question does not seem to me here to arise. It is, however, sufficient to say that whatever rights he had in dealing with the matter are not affected by the Moneylenders Act, 1927, s. 9.

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ROMER L.J. I agree. For the purposes of this case it must be assumed that there is nothing in the rest of the Moneylenders Act, 1927—by the rest I mean in the sections other than s. 9—which would in any way interfere with the right of the petitioning creditors to recover from the debtor the full amount of the interest which they claim to be due to them in excess of the 5 per cent. That being so, it is to be observed that s. 9 in no way affects the amount of the petitioning creditors' debt—that is to say, the amount of the indebtedness of the debtor to the petitioning creditors. All that s. 9 does is to say that for certain purposes in bankruptcy—namely, the presentation of a petition, voting at meetings, compositions and schemes of arrangement, and dividend—that indebtedness shall be treated as being less than it in fact is. Indeed, it expressly recognizes a right of the petitioning creditor to treat the balance of his indebtedness as a debt due to him out of the estate in the event of that estate having been proved sufficient to pay all the debts, including the petitioning creditor's debt with 5 per cent. interest, in full. I therefore think that the learned Registrar was quite justified in coming to the conclusion to which he did come in this

case—that the debtor had not shown any sufficient cause why the receiving order should not be made.

I only want to add this, that the case which came before Mr. Registrar Mellor and which is referred to in the Registrar's judgment was an entirely different one. There the position was that, if bankruptcy supervened and the estate proved insolvent, the petitioning creditor would get nothing more than a dividend on the amount of his principal, and the 5 per cent. interest. If the estate proved solvent, he would then receive the whole or part of the interest in excess of the 5 per cent. The alternative to proceeding in bankruptcy was that he should accept what had been offered to him by the father of the deceased debtor, which was the principal of the debt together with interest at 10 per cent., leaving the petitioning creditor the full liberty to exercise his rights against the estate of the deceased debtor, which, as the Registrar pointed out, was being administered by the executors, so that there was every prospect of the petitioning creditor, if the petition were dismissed, shortly receiving the interest above the 10 per cent., assuming that the estate was sufficient to pay it. In the present case what has been offered is merely the principal sum with 5 per cent. interest, without any assurance being given that the petitioning creditor is likely in the near or even distant future to be paid the balance of his interest. The case appears to me to have been very different from the one with which we are dealing here.

So far as regards the position of a debtor who tenders to the petitioning creditor the whole of what is due to the petitioning creditor—the costs of the petition and so forth—I desire to express no opinion at all. We have not been into the authorities that deal with the question whether, in such a case as that, the learned Registrar may refuse to dismiss the petition. Like Slessor L.J., I express no opinion about it.

GREENE L.J. I agree. The argument presented to us by Mr. Tindale Davis really involves this: That the Registrar, when considering whether he shall exercise his discretion

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C. A. under the Bankruptcy Act, 1914, s. 5, sub-s. 3, and dismiss
1936 the petition, must regard only the principal with 5 per cent.
A DEBTOR, interest on a moneylender's debt as the real effective debt,
In re. and that he ought to disregard any excess interest over the
Greene L.J. 5 per cent. That, in my judgment, is not what is the effect
of the Moneylenders Act, 1927, s. 9, sub-s. 1. That sub-
section does not destroy the excess interest for the purpose
of the bankruptcy law; it leaves it as a real debt
provable in bankruptcy and payable in bankruptcy, but, for
certain limited and specific purposes, it is to be ignored or
postponed. It is to be ignored, for instance, in computing
the fifty pounds which is the minimum on which the
petition can be based. It is to be postponed in the matter
of payment until all the other debts have been paid in
full. It is not postponed in the matter of proof, and in the
end it will get paid if there are sufficient assets. Therefore
it seems to me that, on the face of the sub-section, the
Legislature is quite clearly preserving to the moneylender the
right by means of the bankruptcy procedure to obtain the
payment of that excess interest in addition to the payment
of the principal and interest at the rate of 5 per cent.

The effect of Mr. Tindale Davis's argument, if it were
right, would be to deprive the petitioning creditor of that
right whenever the debtor chose to tender to him the principal,
the 5 per cent. and the costs, and that the Registrar in such
a case should dismiss the petition, leaving the moneylender
in this position—that as regards his excess interest he never
could obtain the benefit of the Bankruptcy Act, 1914, to
recover payment of it, unless it happened that some other
petition were presented, in which case he could prove, and
would be paid if the assets were sufficient. It appears to
me that to accept that argument could be to go right against
the language of s. 9, sub-s. 1, which quite clearly preserves
to the moneylender the right to obtain payment by the
bankruptcy machinery; and it appears to me that, this being
so, it is impossible to accept the argument that the tender
would be a tender of the whole debt, because the answer
is that it would not. It would be a tender of part of

the debt only, and that part of the debt only in respect of which a bankruptcy petition could be presented. In my opinion the learned Registrar did not exercise his discretion on any wrong principle, and I agree that the appeal should be dismissed.

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*Appeal dismissed.*Solicitors for the appellant : *Alec Woolf & Turk.*Solicitors for the respondents : *Woolfe & Woolfe.*

W. I. C.

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SHIRE COUNTY COUNCIL AND OTHERS.

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J.

Feb. 18, 19,

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April 22.

[1933. L. 2505.]

[1933. L. 2957.]

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Oct. 29, 30 ;

Dec. 9.

Local Government—County Council and Local Borough—Local Taxation—Licences and Probate Duty Grants—Equitable adjustment—Order of Special Commissioners—Effect of new legislation—Block grants—Discontinued grants—Financial adjustment altered—Whether original order of Commissioners still in force—Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 32—Local Government Act, 1929 (19 & 20 Geo. 5, c. 17), s. 85, sub-s. 5 ; Sch. XII., Part VI.

In 1891 the Commissioners appointed under the Local Government Act, 1888, for the purpose of determining the equitable adjustments respecting the distribution of the proceeds of local taxation licences and probate duty grants as defined in the Act between the plaintiff corporation and the defendant council and certain other county boroughs, by an order dated October 21, 1891, directed that the aggregate proceeds of these local taxation licences and probate grants payable out of an account called the "Local Taxation Account" should as between the defendant council and the respective county boroughs to whom it was directed, be distributed by way of equitable adjustment as was therein mentioned. The order was subsequently amended from time to time as circumstances altered to meet the extension of some county boroughs and the constitution of three others.

As a result of the coming into force of the Local Government Act, 1929, a new system of grants in aid of local authorities was introduced—namely, "block grants." By s. 85, the grants formerly payable into the "Local Taxation Account" ceased to be payable after March 31, 1930, and were referred to in the Act as "discontinued grants." By sub-s. 5 of that section it was provided that "Where, immediately before the appointed day [April 1, 1930], there is in force a financial adjustment between any spending authorities with respect to any of the discontinued grants payable to those authorities, such financial adjustment shall, as from the appointed day, cease to have effect, and if and so far as, having regard to the Exchequer Grants payable under this Part of this Act, any new financial adjustment is necessary, a new financial adjustment on an equitable basis shall be made by agreement between the spending authorities, or, in default of agreement, by a single arbitrator appointed by the Minister."

The question for determination by the Court was whether the order of 1891 had any and if so what effect since April 1, 1930, and what was the effect of s. 85, sub-s. 5, of the Act of 1929 :—

Held, by the Court of Appeal (affirming the decision of

Luxmoore J.), that the first part of sub-s. 5 of s. 85 applied to every financial adjustment "with respect to any of the discontinued grants" and covered therefore an adjustment that dealt exclusively with a discontinued grant; that therefore an existing adjustment had become inequitable, and a new adjustment was not merely desirable but necessary. The necessity for a new adjustment arose not by reason of the Exchequer Grants but by reason of the existing adjustment having come to an end in whole or in part.

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SPECIAL CASE.

In this action the plaintiffs (inter alia) claimed a declaration that notwithstanding the provisions of the Local Government Act, 1929, an order of the Special Commissioners under the Local Government Act, 1888, determining the equitable adjustment respecting the distribution of the local taxation licences and probate duty grant (as defined in the Act), as amended from time to time for various reasons, had since March 31, 1930, continued and would continue to be operative (unless a new financial adjustment was made pursuant to the Act of 1888) in respect of local taxation licences included in the equitable adjustment made by the above mentioned order and not discontinued by the Local Government Act, 1929. The parties subsequently concurred in having the matters in question brought before the Court by way of a special case.

The following statement of facts is taken from the judgment of Luxmoore J. :—

On November 15, 1933, the Liverpool Corporation instituted an action against the Lancashire County Council claiming a declaration that "notwithstanding the provisions of the Local Government Act, 1929, an order dated October 21, 1891, of the Commissioners appointed in pursuance of ss. 32 and 61 of the Local Government Act, 1888, determining the equitable adjustment respecting the distribution of the local taxation licences and probate duty grant (as respectively defined in the said Act), as amended from time to time by reason of various alterations of boundaries and the constitution of new county boroughs, has, since March 31, 1930, continued to be operative and will continue to be operative (unless and until a new financial adjustment is made pursuant to sub-s. 6

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of s. 32 of the Local Government Act, 1888) in respect of local taxation licences included in the equitable adjustment made by the said order and not discontinued by the Local Government Act, 1929." The writ also claimed that the rights of the parties under the 1891 order might be declared.

To avoid unnecessary expense the parties on July 29, 1935, concurred in stating a special case for the opinion of the Court. The questions propounded for that opinion are "(a) Whether the said order of 1891, amended as before stated, has since April 1, 1930, continued and continues to be operative and binding upon the plaintiffs and defendants with respect to the proceeds of the local taxation licences which remain leviable by the said councils or (b) Whether the said order of 1891, as so amended, ceased to have effect as from April 1, 1930, not only with respect to the discontinued grants comprised therein but also with respect to the proceeds of the said local taxation licences so leviable by the said councils, and in such event (c) Whether a new financial adjustment of the proceeds of the said local taxation licences leviable by the said councils is necessary and ought to be made in the manner provided by s. 85 of the said Act of 1929."

It will be observed that the second question propounded is merely the negative form of the first question. So far as the third question is concerned, Sir Stafford Cripps on behalf of the Liverpool Corporation admitted at the Bar that if the answer to the first question should be in the negative, then the third question must be answered in the affirmative. It was further agreed that if the Court should answer the first question in the affirmative, judgment should be entered for the plaintiffs; but if the answer should be in the negative, and in consequence a new equitable adjustment of the proceeds of local taxation licences is necessary, then judgment should be entered for the defendants with such declarations as the Court may think appropriate. The costs of the action and special case are to follow the event.

The special case was argued before me on February 18, 19, and 21 last. After the arguments had been concluded it seemed to me that a question of jurisdiction arose owing to

the fact that a number of county boroughs which are affected by the 1891 order were not parties to the action or to the special case, although the decision of the questions raised must of necessity affect their respective rights. To avoid any difficulty on this head, I directed that the proceedings should be amended by adding as a party each of the seventeen other county boroughs concerned either as co-plaintiffs with the Liverpool Corporation or as co-defendants with the Lancashire County Council, and that for this purpose the wishes of each county borough council should be ascertained. In pursuance of my direction the writ and special case were amended on March 31, 1936, by adding as co-plaintiffs with the Liverpool Corporation, the Manchester Corporation and the county borough of Salford, and as co-defendants with the Lancashire County Council the county boroughs of Barrow-in-Furness, Blackburn, Blackpool, Bolton, Bootle, Burnley, Bury, Oldham, Preston, Rochdale, St. Helens, Southport, Stockport, Warrington and Wigan. On April 7, 1936, I was informed that none of the parties added by amendment desired to submit to the Court any further argument and that each was desirous of having the questions submitted by the special case determined upon the arguments put forward on behalf of the Liverpool Corporation and the Lancashire County Council respectively, and of being bound by such determination subject only to the right of any party to appeal therefrom.

The 1891 order was made by the Commissioners appointed under the Local Government Act, 1888. That Act established a new unit of local government by the constitution of county councils in every administrative county in England and Wales, and directed that for the purposes of the Act each of certain boroughs specified in the Third Schedule thereto should be deemed to be an administrative county of itself and to be situate within the county named in the same Schedule. Each of these boroughs is referred to in the Act as "a County Borough." The Corporations of Liverpool and Manchester and each of the county boroughs now parties to this action, except the boroughs of Blackpool, Southport and Warrington, are mentioned in the schedule. All of these county boroughs so mentioned,

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C. A. except the borough of Stockport, is to be deemed to be within
1936 the county of Lancaster, while the borough of Stockport is
LIVERPOOL to be deemed to be within the counties of Chester and
CORPORATION Lancaster. The Act regulated the financial relationship to
v. exist after March 31, 1889, between the Exchequer and the
LANCASHIRE county boroughs and the county within which they are to be
COUNTY deemed to be and the contributions to be made by each to
COUNCIL. the union officers.

The material provisions in respect of these matters are to be found in ss. 20 to 27 inclusive. They are as follows :
(a) the Commissioners of Inland Revenue are to pay into the Bank of England to an account to be called the " Local Taxation Account " such sums as might be ascertained as therein provided to be the proceeds of the duties collected by those Commissioners in each administrative county in England and Wales on the licences specified in the First Schedule to the Act (which are therein referred to as " local taxation licences "), and that the amounts so ascertained to have been collected in each county in respect of duties on " local taxation licences " should be certified by the said Commissioners and paid out of the " Local Taxation Account " to the council of such county. (b) The said Commissioners shall pay into the " Local Taxation Account " such sums as might be ascertained as therein provided to be four-fifths of one-half of the proceeds of the sums collected by them in respect of the probate duties as therein defined. (c) The sums so paid to the " Local Taxation Account " in respect of the proceeds of the probate duties, therein referred to as the " probate duty grant," should be distributed among the several counties in England and Wales in proportion to the share which the Local Government Board should certify to have been received by each county during the financial year ending March 31, 1889, out of the grants theretofore made out of the Exchequer in aid of local rates which would cease to be granted after the passing of that Act. (d) That all sums from time to time received by a county council in respect of (i.) the duties on the " local taxation licences," whether collected by the Commissioners of Inland Revenue or by the county council,

and (ii.) the "probate duty grant" should be paid to the county fund and carried to a separate account therein referred to as the "Exchequer Contribution Account," and be applied as and in the order therein provided. Sect. 24 of the Act contained a recital to the effect that the grants theretofore made out of the Exchequer in aid of local rates (therein referred to as "local grants") would, by reason of the duties on the "local taxation licences" and the "probate duty grant" being made payable by the Act to local authorities, cease; and provided (i.) for the repeal of so much of any enactment which required or authorized payment out of the Exchequer of any local grant in substitution for which the county council was required by that Act to make any payment, and (ii.) for the payment by the council of each county out of the county fund and the charge to the "Exchequer Contribution Account" of the sums in that section specified, being sums payable to the guardians of the poor and their local authorities or transferable to particular accounts of the county fund. Sect. 32 of the Act provided, among other things, by sub-s. 1 that "An equitable adjustment respecting the distribution of the proceeds of the local taxation licences, and probate duty grant, and respecting all other financial relations, if any, between each county, and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement, within twelve months after the appointed day, between the councils of each county and each borough, and in default of any such agreement, by the Commissioners appointed under this Act; and such adjustment shall provide, in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute, and save as provided by this Act, any existing liability to contribute or to incur expense shall, after the appointed day, cease, and an equitable provision for such cessation shall be made in the adjustment." By sub-s. 3: "In such adjustment regard shall be had to the existing property, debts, and liabilities (if any) connected with the financial relations of the county and borough, and to the

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consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act, and to the amount of benefit and value of the services which the borough receives in return for existing contributions, if any, and to all the circumstances of each case which it appears equitable to consider, subject nevertheless to the following provisions":—The rest of the sub-section is immaterial so far as the questions to be decided in this case are concerned. Sub-s. 6 is as follows: "Provided that at any time after the end of five years from the date of an agreement or award adjusting the financial relations of any county and borough, if the council of either the county or borough satisfy the Local Government Board that the adjustment has become inequitable, and that the councils are unable to agree on a new adjustment, the board shall appoint an arbitrator; and such arbitrator shall proceed to make a new equitable adjustment as if he were the Commissioners under this Act, and the provisions of this Act shall apply accordingly. Any new adjustment made by agreement, or by the award of an arbitrator under this section, may, after the expiration of five years from the date of such agreement or award, be altered either by agreement or by arbitration as above mentioned." By s. 61 of the Act certain persons were appointed for the purposes of the Act. Sect. 62 of the Act provided, among other things, by sub-s. 1 that "Any councils and other authorities affected by this Act or by any scheme, order, or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as affected by this Act or such scheme, order, or thing, of the parties to the agreement, and the agreement and any other agreement authorised by this Act to be made for the purpose of the adjustment of any property,

debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint user of any property, and for the transfer of any duties, and for the payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum, or of a terminable annuity for a period not exceeding that allowed by the commissioners under this Act or the Local Government Board."

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The 1891 order was made by the Commissioners appointed under the Act and was directed to the Lancashire County Council and the county boroughs which are respectively parties to this action, except the boroughs of Blackpool, Southport, and Warrington, which were not then in existence. The 1891 order directed that the aggregate proceeds of the "local taxation licences" and "probate grants" payable out of the "Local Taxation Account" should, as between the Lancashire County Council and the respective county boroughs to whom it was directed, be distributed by way of equitable adjustment as was therein mentioned.

Subsequent to the making of the 1891 order and before the coming into force of the Local Government Act, 1929, the 1891 order was from time to time amended in order to meet the circumstances resulting from the extension of the county boroughs to which it was directed or some of them and from the constitution of the boroughs of Blackpool, Southport, and Warrington as new county boroughs. In consequence of such amendments the aggregate proceeds were immediately before April 1, 1930, distributable by way of equitable adjustment between the Lancashire County Council and the respective county boroughs which are parties to this action in the manner set out in para. 9 of the special case.

By s. 19 of the Finance Act, 1894, a portion of the proceeds of the estate duty derived from personal property was substituted for the "probate duty grant," and by s. 17 and the Second Schedule of the Finance Act, 1907, it was enacted,

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among other things, that the estate duty grants paid under s. 19 of the Finance Act, 1894, should, instead of being charged in the manner provided by the Acts relating thereto, be charged on and paid out of the Consolidated Fund or the growing produce thereof (see sub-s. 1) ; and that the proceeds of the duties on "local taxation licences," including any duty chargeable under s. 8, sub-s. 1, of the Locomotives on Highways Act, 1896, should be paid into the Exchequer, instead of into the "Local Taxation Account," and that there should be paid out of the Consolidated Fund or the growing produce thereof into the "Local Taxation Account" a sum equal to the amount which would have been paid into the last mentioned account as the proceeds of the said duties if that Act had not been passed.

By s. 6 of the Finance Act, 1908, as amended by the Finance Act, 1921, s. 62, it was provided that the power to levy the duties on "local taxation licences," specified in the section, should be transferred to county councils in England and Wales as from a date to be fixed by Order in Council, and that s. 17 of the Finance Act, 1907, should, as from that date, cease to apply to such duties or the proceeds thereof. The section expressly provided that the transfer should not affect any equitable adjustment respecting the distribution of the proceeds of the "local taxation licences" made under the Local Government Act, 1888, or otherwise, but directed that provision might be made by Order in Council for any alteration which might appear to be necessary or expedient in consequence of the transfer in the procedure for making payments or otherwise giving effect to any such adjustment.

By Order in Council dated October 19, 1908 (Statutory Rules and Orders, 1908 (p. 470), No. 844), it was provided that the date of the transfer should be January 1, 1909. The said Order provided by cl. 8 that : "If on the determination, according to any equitable adjustment, of the share of any county in the Estate Duty grant, the proceeds of the Local Taxation Licence Duties, and the sums which in pursuance of the Finance Act, 1907, are paid in lieu of those duties, and the Local Taxation (Customs and Excise) Duties,

in respect of any financial year, it shall be found that the sum actually received in respect of that year by any County exceeds the share of that County, the amount of such excess shall be paid by the Council of that County to the Council of the County entitled to receive the same. In case of dispute as to the share of any Council according to any such adjustment in the said grant, duties, and sums, an appeal may be made to the Local Government Board and the decision of that Board on any such appeal and on any matter or question which is in their judgment incident thereto or consequent thereon shall be final and conclusive." By the terms of the said Order the expression "County" included "County Borough," and the expression "Council of a County" included "Council of a County Borough." By virtue of the joint operation of the Finance (1909-1910) Act, 1910, s. 88, the Revenue Act, 1911, s. 18, and the Roads Act, 1920, s. 2, fixed sums became payable out of the Consolidated Fund into the "Local Taxation Account" in respect of the duties on certain licences, among those local taxation licence duties, payable to the "Local Taxation Account" instead of the actual proceeds of such duties; with the result that immediately before April 1, 1930—the date on which the provisions of the Local Government Act, 1929, relevant to this case, came into operation—the moneys affected by the 1891 order and the adjustment effected thereby were (a) the produce of the estate duty grant; (b) the sums payable under the Finance Act, 1907, or other Acts in respect of "local taxation licences" not collected by county and county borough councils; and (c) the proceeds of the "local taxation licences" collected by the Lancashire County Council and the councils of the several county boroughs which are parties to this action. The majority of the amounts mentioned under these headings vary from year to year.

On April 1, 1930, there was no application pending by any of the parties to this action to vary the financial adjustment provided by the 1891 order as from time to time amended, and the adjustment effected by that order as so amended was accepted up to that date by all the said parties as a fair

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and equitable adjustment under the conditions prevailing before that date of the proceeds of such of the "local taxation licences" and "probate duty grant" or the "estate duty grant" as were substituted therefor and for the other grants affected by such adjustment.

The Local Government Act, 1929, transferred to the councils of counties and county boroughs the powers and duties of the poor law authorities as defined in the Act, and to county councils the powers and duties of rural district councils in respect of highways and of urban district councils in respect of classified roads. The said Act also made provision for a new system of grants in aid of local authorities. These grants are generally known as "block grants," because they are not appropriated to any particular service. Sect. 85 of the Act provided that (a) the grants payable out of the Consolidated Fund or the growing produce thereof into the "Local Taxation Account" and (b) the grants in aid of certain health services should, with certain other grants, cease to be payable in respect of any period after March 31, 1930. The grants which so ceased to be payable are referred to in the Act as "the discontinued grants." The section also provided that the "Local Taxation Account" and the "Exchequer Contribution Account" of every county or county borough should be wound up as soon as might be after April 1, 1930. By sub-s. 5 it provided that: "Where, immediately before the appointed day"—that is April 1—"there is in force a financial adjustment between any spending authorities with respect to any of the discontinued grants payable to those authorities, such financial adjustment shall, as from the appointed day, cease to have effect, and if and so far as, having regard to the Exchequer grants payable under this Part of this Act, any new financial adjustment is necessary, a new financial adjustment on an equitable basis shall be made by agreement between the spending authorities, or, in default of agreement, by a single arbitrator appointed by the Minister." Sect. 86 provided for the payment out of the Exchequer of an annual contribution towards local government expenses in counties and county boroughs to be called

the "General Exchequer Contribution." These are the grants usually known as "block grants" to which I have already referred. By s. 88 these "block grants" are to be apportioned amongst the several counties and county boroughs in proportion to their weighted populations subject as is stated in the last mentioned section. Provision is made by ss. 90 and 96 of the Act for additional Exchequer grants to the councils of counties and county boroughs. Sect. 105 provides that all sums received by a county council (which does not include a county borough council (see the definition of "county" contained in s. 134)) by way of general or additional Exchequer grant or of proceeds of local taxation licence duties should be applicable to general county purposes. By virtue of s. 137, and the Twelfth Schedule, Part VI., of the Act, ss. 21 to 27 of the Local Government Act, 1888, are repealed in their entirety, and s. 32 of the Act is also stated to be repealed "so far as it relates to the discontinued grants."

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Hon. Sir Stafford Cripps K.C., H. P. Glover K.C., G. Granville Slack and W. J. Kenneth Diplock for the plaintiffs. It is necessary first to consider the order of the Commissioners appointed under the Local Government Act, 1888, in pursuance of ss. 32 and 61 of the Act, and dated October 21, 1891; and especially art. 3 of the order. (1) Incidental amendments have been made in this order arising, for instance, from the

(1) Art. III.: "Out of the aggregate proceeds of the said licences and grant, payable out of the Local Taxation Account in respect of the financial year ended March 31, 1892, and of each succeeding financial year, to or on behalf of the County of Lancaster and county boroughs deemed for the purposes of the said Local Government Act to be therein situate, including the amount brought in each such year into account in the adjustment on behalf of the county borough of

Stockport as aforesaid, there shall be paid from the said account to the Lancashire County Council and to the councils of the said county boroughs the sums severally next herein-under stated against the name of the county and of each such county borough; or if the said aggregate proceeds shall in any year fall short of the total of the sums mentioned, then the same shall be divided between the said county and borough councils in the proportion of such sums, viz."

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constituting of certain boroughs as new county boroughs—namely, Blackpool, Southport, and Warrington; but the financial adjustment under the order was substantially that which was in existence down to 1929. There has been no revision, only slight modification in the order. The question is whether this order still governs the distribution of local taxation grants or whether the Local Government Act, 1929, has altogether put an end to this arrangement brought about by the order of 1891.

The difficulty is really caused by s. 85, sub-s. 5, of the Act of 1929. (1) If the first half of the sub-section down to the words “such financial adjustment shall . . . cease to have effect,” is read, it seems reasonably clear that this must mean what it says—namely, it ceases to have effect. The question is, Is it to cease to have effect altogether or is it to cease to have effect quoad the discontinued grants only? It is submitted that every financial adjustment which existed covered both discontinued and non-discontinued grants. A point is, What do the words in the sub-section “having regard to the Exchequer Grants payable under this Part of this Act” mean? Another might be as to the meaning of the words “is necessary” in the latter portion of the sub-section: “any new financial adjustment is necessary.”

It is submitted that when these words “such financial adjustment shall . . . cease to have effect” are read, they must be unqualified. The “financial adjustment” mentioned—because it is to be in respect of discontinued grants—can only be an adjustment under s. 32 of the Local Government Act, 1888. It has here really a semi-technical meaning. The discontinued grant was the object clearly in contemplation.

(1) Sect. 85, sub-s. 5: “Where, immediately before the appointed day, there is in force a financial adjustment between any spending authorities with respect to any of the discontinued grants payable to those authorities, such financial adjustment shall, as from the appointed day, cease to have effect, and if and so far as, having

regard to the Exchequer grants payable under this Part of this Act, any new financial adjustment is necessary, a new financial adjustment on an equitable basis shall be made by agreement between the spending authorities, or, in default of agreement, by a single arbitrator appointed by the Minister.”

It is submitted that notwithstanding the Local Government Act, 1929, the order of 1891 (as amended) has since April 1, 1930, remained and still remains operative and binding as between the parties hereto with respect to the distribution of the proceeds of such of the local taxation licences as are leviable by the county council and the councils of the Lancashire county boroughs (including Stockport) under the Finance Act, 1908, s. 6.

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Further the said order of 1891, as amended, will remain so operative with respect to the distribution of the proceeds of the said local taxation licences so leviable by the said councils unless and until they are varied by a new equitable adjustment made pursuant to the Act of 1888, s. 32.

Tyldesley Jones K.C. and *Ralph Etherton* for the defendants. By virtue of s. 85, sub-s. 5, of the Local Government Act, 1929 (1), the order of 1891 ceased to have effect as from April 1, 1930, not only with respect to the discontinued grants but also with respect to the proceeds of the local taxation licences leviable by the various councils under the Finance Act, 1908, s. 6. Further it is submitted that as the amended order of 1891 was a financial adjustment dealing as one fund with such of the proceeds of the local taxation licences as were leviable by the various councils and also with the discontinued grants, it is necessary to have a new financial adjustment from April 1, 1930, by virtue of the Act of 1929, s. 85, sub-s. 5. (1)

Sir Stafford Cripps K.C. in reply.

Cur. adv. vult.

1936. April 22. LUXMOORE J. stated the facts as above set out and continued: The question to be determined is whether the 1891 order has had any and what effect since April 1, 1930. The order effected an equitable adjustment between the parties bound by it in respect of an aggregate sum made up in the main of the duties on "local taxation licences" and the "probate duty grant," which was subsequently replaced by the "estate duty grant." The adjustment

(1) See note (1) on p. 202.

C. A. was presumably made after taking into consideration the
1936 totality of the payments which went to make up that
LIVERPOOL aggregate sum, and it is not difficult to appreciate that the
CORPORATION balance of the adjustment would in all probability be
v. disturbed if certain of the payments which go to make up
LANCASHIRE the totality dealt with by the order are withdrawn from
COUNTY its operation.
COUNCIL.

Luxmoore J.

The answer to the question is purely one of construction of the Act. If s. 85 stood alone it seems fairly plain that the 1891 order would cease to have effect. The material words of that section are (sub-s. 5): "Where, immediately before the appointed day"—that is April 1, 1930—"there is in force a financial adjustment between any spending authorities"—county and county borough councils are such authorities—"with respect to any of the discontinued grants payable to those authorities, such financial adjustment shall, as from the appointed day, cease to have effect. . . ." Pausing here and applying the words I have read to the present case there was a financial adjustment—namely, the 1891 order between the spending authorities, parties to this action, with respect to the discontinued grants payable to them. It is true that the financial adjustment also covered other moneys, but these were treated in the financial adjustment as one aggregate with the discontinued grants. There is nothing to suggest that the financial adjustment is to cease to have effect partially or that it is to remain in force with regard to moneys, other than those included under the description "discontinued grants." Had it been intended to preserve the operation of the financial adjustment one would have expected to find inserted after the words "cease to have effect" some such phrase as "so far as it relates to the discontinued grants but not further or otherwise." The section contemplates the necessity for a new financial adjustment and provides a new method for arriving at it. The argument in favour of the continued existence of the 1891 order to a limited extent, namely, to the proceeds of "local taxation licences," is based on the fact that in Part VI. of the Twelfth Schedule, s. 32 of the Local Government Act,

1888, is not entirely repealed but is only repealed "so far as it relates to the discontinued grants." It may be that s. 32 still remains in force if there is any purpose for which it is required, but I do not think that the fact that the repeal of s. 32 is expressed to be partial is sufficient to justify any departure from the clear words of s. 85. I gather that if the 1891 order remains in force the councils which are co-plaintiffs in this action receive a benefit at the expense of those which are co-defendants, and that it is this fact which has rendered the action necessary.

In my judgment the question whether the 1891 order remains in force with regard to the proceeds of "local taxation licences" must be answered in the negative. I propose therefore to make a declaration to that effect and to declare that a new financial adjustment is necessary in respect of the proceeds of the "local taxation licences" and that such new adjustment ought to be made in the manner provided by s. 85 of the Act of 1929.

A. R. T.

The Liverpool Corporation appealed. The appeal was heard on October 29 and 30, 1936.

Hon. Sir Stafford Cripps K.C., H. P. Glover K.C., and G. Granville Slack for the appellants.

Tyldesley Jones K.C. and Ralph Etherton for the respondents.

The arguments were substantially the same as those in the Court below.

Cur. adv. vult.

1936. Dec. 9. The judgment of the Court (LORD WRIGHT M.R., ROMER and GREENE L.JJ.) was read by

ROMER L.J. At the date of the passing of the Local Government Act, 1929, the financial relations between counties and county boroughs in respect of certain grants in aid and other matters were governed by what are known as equitable adjustments. These adjustments had their origin in s. 32 of the Local Government Act, 1888, which directed

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that equitable adjustments should be made by agreement, or in default of agreement by Commissioners, respecting (among other things) the distribution of the local taxation licences and probate duty grant, between a county and the county boroughs situate within it which were constituted as such by the Act. The local taxation licences referred to were the amounts collected in a county by the Commissioners of Inland Revenue. The probate duty grant was the county's proportion of four-fifths of one-half of the probate duties collected by the same Commissioners. Both the local taxation licences and the probate duty grants were to be paid into the Local Taxation Account and distributed among the counties, each county receiving, as regards the former, the amount collected in the county, and, as regards the latter, its proportion of the total sum distributable ascertained as provided in the Act.

Sub-s. 3 of s. 32 of the Act specified certain matters to which regard was to be had in making the equitable adjustment. Sub-s. 6 provided for quinquennial revision of an adjustment by an arbitrator appointed by the Local Government Board in default of agreement in any case where it was shown to the satisfaction of the Board that the adjustment had become inequitable.

On October 21, 1891, the Commissioners appointed under the Act of 1888 made an order adjusting the distribution of the proceeds of the local taxation licences and the probate duty grant among the county of Lancaster and the various county boroughs of Lancashire. The order recites the intention of the Commissioners to adjust the other financial relations between the county and the county boroughs by separate and subsequent orders. The scheme of the order was to treat the proceeds of the licences and the grant as one aggregate fund out of which the county and county boroughs were to receive in the first instance fixed sums amounting in the aggregate to 462,942*l.*, the balance being distributed according to a table of percentages. Certain other grants were made by subsequent statutes, but it is not necessary for the moment to refer to them.

By s. 19 of the Finance Act, 1894, a portion of the proceeds of the estate duty on personal property was substituted for the probate duty grant.

By s. 6 of the Finance Act, 1908, the power to levy the duties on certain local taxation licences was transferred to county councils, and the sums collected by them were to be subject to the equitable adjustments made under the Local Government Act, 1888.

The result of this legislation was that at the date when the relevant provisions of the Local Government Act, 1929, took effect the moneys subject to the adjustment order of October 21, 1891, were (a) the estate duty grant, (b) sums payable in respect of local taxation licences not collected by the councils, (c) proceeds of local taxation licences collected by councils.

The Local Government Act, 1929, introduced a new system of grants in aid. Certain grants (called in the Act "the discontinued grants") were to cease to be payable and in their place annual contributions towards local government expenses (usually referred to as "block grants") were to be made direct to counties and county boroughs. The amount of these grants was to be fixed in accordance with a scheme laid down in the Act. We need not state the details of that scheme. It is sufficient to say that it introduced an entirely new method of fixing the amount of the grants in aid which the various authorities were to receive, and had no relation to the principles (whatever they may have been) by which equitable adjustments had been made by the Commissioners under the Act of 1888, although those adjustments had for certain limited purposes to be taken into account in ascertaining the amounts of the block grants. The discontinued grants included the grants referred to under letters (a) and (b) above—namely, the estate duty grant and the sums payable in respect of local taxation licences not collected by councils and also certain other grants, including in particular the grant in respect of which the order of April 23, 1891, hereinafter referred to, was made. The result, therefore, was that the only sums dealt with by the order of October 21, 1891, which were not included in the discontinued grants

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C. A. were those lettered (c) above—namely, the proceeds of local
 1936 taxation licences collected by councils.
 LIVERPOOL In these circumstances a question has arisen between the
 CORPORATION plaintiffs in this action, who are the Corporation of Liverpool,
 v. Manchester and Salford, and the defendants, who are the
 LANCASHIRE County Council of Lancashire and the other county boroughs
 COUNCIL. in that county, as to the effect of s. 85, sub-s. 5, of the last
 ——— mentioned Act upon the order of October 21, 1891. It is

contended on the part of the plaintiffs that the order remains operative as to the local taxation licences still being collected by the plaintiffs and defendants, and has only ceased to have effect so far as regards the discontinued grants. The defendants contend, on the other hand, that the order has ceased to have any effect at all. It was for the purpose of having that question determined that this action was instituted and in due course came before Luxmoore J. in the form of a special case. The learned judge decided the question in favour of the defendants, and from that decision an appeal is brought by the plaintiffs to this Court.

The question, therefore, that arises on this appeal is as to the construction that ought to be placed upon s. 85, sub-s. 5, of the Local Government Act, 1929. The earlier part of this sub-section is in these terms: "Where immediately before the appointed day, there is in force a financial adjustment between any spending authorities with respect to any of the discontinued grants payable to those authorities, such financial adjustment shall, as from the appointed day, cease to have effect." Pausing there, it would seem to be reasonably clear that the order of October 21, 1891, as from time to time amended, did constitute immediately before the appointed day a financial adjustment between the several spending authorities who are parties to this action "with respect to" some of the discontinued grants—namely, the estate duty grant and the sums payable in respect of local taxation licences not collected by those authorities themselves—and none the less because it was also a financial adjustment in respect of the proceeds of the local taxation licences that were being collected by the authorities. If the intention of

the Legislature had been to determine every adjustment only so far as it related to any of the discontinued grants it is extraordinarily unlikely that it would have used the language that appears in the sub-section instead of expressing that intention, as it could so easily have done, in plain terms. But apart altogether from this consideration, it is urged on behalf of the respondents to the appeal that it is highly improbable that the Legislature had any such intention in fact; for in making the order of October 21, 1891, the Commissioners appointed by the Act of 1888 were dealing with an aggregate fund consisting of the proceeds of the local taxation licences and probate duty grants, and the Legislature in the year 1929 would not, it is said, readily assume that the proportions in which this aggregate fund was allotted by the Commissioners to the various bodies affected by the order would have been the proportions in which they would have allotted any particular integer of such aggregate fund.

It should be noted in this connection that the order itself contains the following recital: "Whereas the said Commissioners propose by the present order to adjust the distribution of the proceeds of the local taxation licence and probate duty grant and propose by separate and subsequent orders to adjust the other financial relations between the said county and county boroughs." We have not been supplied with the details of these other financial relations of the separate and subsequent orders made by the Commissioners in respect to them. But the recital does seem to give some indication that the proportions fixed by the order would not necessarily have been the proportions that the Commissioners would have thought to be equitable in adjusting the other financial relations between the parties, and that if some other integer had been added to the aggregate fund with which the Commissioners were dealing the proportions fixed by the order might well have been different from what they in fact were. In this connection reference may usefully be made to the Customs and Inland Revenue Act, 1890, and the Local Taxation (Customs and Excise) Act, 1890. By s. 7 of the former of those Acts it was provided that certain duties

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C. A. therein mentioned and called the local taxation (customs and
1936 excise) duties should be divided in the same proportions and
LIVERPOOL paid to the same local taxation accounts and should be
CORPORATION ascertained as to proportions and otherwise in the like manner
v. as the one-half of the proceeds of the probate duties applicable
LANCASHIRE to local purposes was then by law divided, paid and ascertained,
COUNTY and that the proceeds so paid should be appropriated as
COUNCIL. Parliament might thereafter direct by any Act passed in the
then present session. It was accordingly enacted by s. 1 of the
latter of the two Acts to which we have referred that after
payment out of the English share of such duties of a sum for the
purpose therein mentioned the residue should, unless Parlia-
ment should otherwise determine, be distributed between
county and county borough funds and applied under the Local
Government Act, 1888, as if it were part of the English share
of the local taxation probate duty and should be the subject
of an adjustment between counties and county boroughs
according to s. 32 of the said Act by the Commissioners under
that Act. It is to be noticed that the Legislature did not
think fit to enact that the duties should be divided in the
same proportions as those already fixed, or to be fixed, by
the Commissioners in respect to the probate duty. If, as the
Legislature seems to have thought, the addition of another
integer to an aggregate fund comprised in an adjustment
might possibly make it necessary to adopt new proportions,
so too the elimination of an integer from the aggregate fund
might make it inequitable to continue to apply the proportions
to what remained. In point of fact the adjustment under
these two Acts was effected by an order of the Commissioners
dated April 23, 1891, and this order provided for the distri-
bution of Lancashire's share of the duties in question among
the county and the county boroughs according to a percentage
table which was the same as that subsequently adopted in
the order of October 21, 1891. This, however, is immaterial.
The point is that the Legislature contemplated that the adjust-
ment of the duties dealt with by these two 1890 Acts would not
necessarily be the same as the adjustment of the probate duty.

It does, therefore, seem improbable that the Legislature

should have intended in such a case as the present to annul the adjustment so far only as it related to the discontinued grants, and leave the adjustment still operative as to the proceeds of local taxation licences collected by the councils themselves. The appellants contend, however, that the later words of sub-s. 5 to which attention has not yet been called, show that this was in truth the intention of the Legislature and are consistent only with the construction they ask the Court to adopt.

The latter part of the sub-section is in these words: "and if and so far as, having regard to the Exchequer Grants payable under this Part of this Act, any new financial adjustment is necessary, a new financial adjustment on an equitable basis shall be made by agreement between the spending authorities, or, in default of agreement, by a single arbitrator appointed by the Minister."

Now it is said on the appellants' behalf that, if in a case like the present the whole financial adjustment ceases to have effect, a new financial adjustment will inevitably be necessary, whereas if the financial adjustment only ceases to have effect as far as it relates to the discontinued grants, a new financial adjustment may or may not be necessary. The words "if and so far as necessary" are therefore, so runs the argument, appropriate only to the latter of these two constructions. It is, however, to be observed that the first part of the sub-section is not concerned only with cases like the present. It applies to every financial adjustment "with respect to any of the discontinued grants," and covers therefore an adjustment that deals exclusively with a discontinued grant. When such an adjustment ceases to have effect it is obvious that no new adjustment will be necessary. So that the words "if and so far as necessary" are properly used even if the respondents' contention should prevail. It was, indeed, argued on the appellants' behalf that on that construction no effect can be given to the words "so far as." But those words would seem to be ineffective even if the appellants' construction be adopted. Whether a new adjustment becomes necessary by reason of an existing adjustment having been revoked altogether by the sub-section or by reason of its only

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having been revoked so far as it related to a discontinued grant, the extent of the adjustment necessary will be the same.

We may here refer to a contention put forward on the part of the respondents that upon the appellants' construction and in cases like the present a new adjustment may or may not be desirable or equitable, but cannot be necessary, whereas upon their own construction a new adjustment is necessitated by reason of the positive enactment in s. 32, sub-s. 1, of the Local Government Act, 1888, requiring that an equitable adjustment of the proceeds of the local taxation licences shall be made and of the fact that the machinery provided by that Act for making such an adjustment is no longer available. It is true that s. 32 of the Act of 1888 remained in force after the Act of 1929 so far as it affected the proceeds of the local taxation licences collected by the county and borough councils, the section having been repealed by the latter Act so far only as it related to the discontinued grants. (See Part IV. of the Twelfth Schedule to the Act.) But, in our opinion, where an existing adjustment has become inequitable a new adjustment is not merely desirable, it is necessary. That seems to have been the view of the Legislature in 1888. For in sub-s. 6 of s. 32 of the 1888 Act it is provided that where the Local Government Board are satisfied that an adjustment has become inequitable and the councils concerned are unable to agree then the arbitrator appointed by the Board shall, not may, make a new equitable adjustment. There seems no reason to suppose that the Legislature held a different view when passing the Local Government Act, 1929.

So far we have been considering the words "if and so far as any new adjustment is necessary" as though they were unqualified in any way. In fact, however, they are qualified by the words "having regard to the Exchequer grant payable under this Part of this Act." It is very difficult to understand what the Legislature intended to effect by these words. Whether the construction put forward by the respondents or that put forward by the appellants be accepted the necessity for a new adjustment arises in cases like the present, not by reason of the Exchequer grants, but by reason of the existing

adjustment having come to an end in whole or in part. In these cases, however, the existence of the Exchequer grants might affect materially the terms of the "new financial adjustment on an equitable basis" if they could properly be taken into consideration; and it is possible that by the use of the words in question the Legislature merely intended to make it clear that this might be done. But, however this may be, we cannot find in these words any justification for not giving the words "with respect to any of the discontinued grants" in the earlier part of the sub-section their ordinary meaning and treating them as though they were "so far as it relates to any of the discontinued grants."

The appellants placed some reliance on the fact that the Act of 1929 only repealed s. 32 of the Act of 1888 so far as it relates to the discontinued grants. But the preservation of s. 32 so far as it relates to the other financial relations between the spending authorities would seem to have been necessary in any view of the case. For whether the contention of the appellants or that of the respondents be accepted, any adjustment in force immediately before April 1, 1930, relating solely to the proceeds of the local taxation licences leviable by the councils remains unaffected by the Act and no new financial adjustment will be required under the sub-section. That existing adjustment might, however, thereafter become inequitable for some reason or another, and unless s. 32, sub-s. 6, remained in force no new adjustment could be made.

For these reasons we are of opinion that the questions submitted to the Court by the special case were rightly answered by Luxmoore J., and that this appeal should be dismissed.

LORD WRIGHT M.R. The appeal will be dismissed with costs.

Appeal dismissed.

Leave to appeal to House of Lords granted.

Solicitors for appellants: *F. Venn & Co., for Walter Moon, Town Clerk, Liverpool.*

Solicitors for respondents: *Norton, Rose, Greenwell & Co., for Sir George H. Etherton, County Solicitor, Preston.*

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[1933. N. 257.]

EVE J.

April 3;

Nov. 4.

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Jan. 11.

Partnership—Action for dissolution—Judgment—Receiver appointed—Payment of assets into Court—Charging order made on fund in Court—Solicitors' charging orders on assets preserved—Priority of orders inter se and as against general creditors—Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37), s. 69.

In an action for dissolution of partnership a receiver was appointed, who collected the assets and paid them into Court. In the course of the action the defendant partner was adjudicated bankrupt and his trustee in bankruptcy added as a defendant. The assets proved insufficient to pay the creditors in full. Judgment creditors then obtained a charging order on the fund in Court and any moneys in the hands of the receiver in the form made in *Kewney v. Attrill* (1886) 34 Ch. D. 345. This order ended with the statement: "The intention of this Court being to preserve to the applicants such legal rights as they would have had if the sheriff had seized under the execution and sold on this day." At a subsequent date both the plaintiff's solicitor and the solicitors of the defendant's trustee in bankruptcy obtained charging orders for their bills of costs under the Solicitors Act, 1932, s. 69, on the fund in Court:—

Held, by Eve J., (1.) that the solicitors' charging orders were properly made, as the assets had been recovered or preserved through their exertions, and these orders ranked before all other claims on the fund in Court: *Jackson v. Smith* (1884) 53 L. J. (Ch.) 972 applied.

(2.) That the *Kewney v. Attrill* charging order gave no priority to the creditors obtaining it over the general body of creditors.

On appeal against the second part of the order:—

Held, (1.) (reversing the decision of Eve J. on this point) that the charging order in the form made in *Kewney v. Attrill* gave the judgment creditors priority over the general body of creditors.

(2.) That the passage declaring the intention of the order should be omitted from the form of order.

PETITION.

The petition was presented by J. J. Macintyre, the solicitor to the plaintiff in a partnership action, asking for the payment out of moneys lodged in Court by a receiver appointed in the action, of taxed costs payable to the petitioner as the plaintiff's solicitor, and also of other sums for costs payable to the solicitors of the defendant trustee in bankruptcy and of partnership debts payable to other creditors and secured by charging orders.

The plaintiff and original defendant carried on business in

partnership as dealers in radio apparatus at Sutton, Surrey, until February 2, 1933, when the plaintiff commenced this partnership action, asking for the usual relief, and an order was made therein on February 7, appointing Charles Latham receiver and manager, and for the usual accounts and inquiries.

On June 23, 1933, the original defendant was adjudicated bankrupt, and on November 9 the trustee of his property was added as defendant to the action. At the date of the petition the liabilities of the firm had been ascertained at 415*l.* 18*s.* 11*d.*, together with a claim by Messrs. Mills, Lockyer & Co. for 178*l.* 2*s.* 4*d.* for costs. The assets amounted to 1414*l.* 16*s.* 3*d.*, represented by the fund in Court and a sum of 13*l.* 1*s.* in the hands of the receiver.

The respondents, C. E. Mills and W. A. Evill, partners in the firm of Mills, Lockyer, Church & Evill, obtained judgment for their claim of 178*l.* 2*s.* 4*d.*, and on July 17, 1935, Bennett J. made the following order: "This Court doth declare that the applicants are entitled to a charge for the amount of their judgment debt interest and costs recovered against the plaintiff and the defendant John Henry Pougher by the said judgment dated March 8, 1935, and upon the assets which now are in or may hereafter come to the hands of . . . the receiver . . . the applicants by their counsel submitting that such charge shall be dealt with in such manner as this Court shall direct the intention of this Court being to preserve to the applicants such legal rights as they would have had if the sheriff had seized under the execution and sold on this day." This order was in the form first settled by Kay J. in *Kewney v. Attrill*. (1)

On July 31, 1935, the petitioner obtained a charging order on the funds in Court as being property recovered or preserved through his instrumentality for the amount of his taxed costs. On the same date Messrs. G. B. Hemming & Co., solicitors to the defendant trustee in bankruptcy, obtained a similar charging order for their taxed costs.

The petition now asked that the sums secured by these orders should be paid out of the funds in Court and the moneys in

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C. A. the hands of the receiver, and raised questions as to the priorities between them. There was evidence that the parties refused to take any further steps in the action.

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G. D. Johnston for the petitioner. The direction in the order of 1933 to pay the debts of the partnership is merely for the protection of the partners, and gives no right to the creditors of the business. A partner is liable to be sued by any creditor, and the order is to secure that partnership debts should be paid out of the assets of the firm as far as possible and not out of a partner's separate estate. The common form of order contains no mention of creditors: see *Seton on Decrees*, vol. iii., p. 2097; the direction to pay debts is part of the order appointing a receiver: *Seton*, vol. i., p. 728; and it is not necessary to have a receiver at all in a partnership action. The creditor can obtain judgment against the firm, and then levy execution on the property of one or other of the partners, but he cannot interfere in the partnership action: *Partnership Act*, 1890, s. 12; and *Clark & Son v. Cullen* (1); *Brocklebank v. East London Ry. Co.* (2); *Blundell v. Blundell*. (3) Any act on the part of a creditor to interfere with the partnership property after a receiver has been appointed will be restrained by the Court: *Dixon v. Dixon* (4), and it was for that reason that the form of order known now as the *Kewney v. Attrill* (5) order was invented. Kay J. made that order in the presence of a creditor, and the reason he did so was that the point was then a new one. But now that the practice of making such an order is well established it is unnecessary for a creditor to be present.

The charging orders made in favour of the petitioner and of the solicitors to the defendant trustee in bankruptcy were made under s. 69 of the *Solicitors Act*, 1932, on the principle of salvage, that the property had been recovered or preserved through their instrumentality, and these orders give them priority over all other creditors: *Jackson v. Smith*. (6) In

(1) (1882) 9 Q. B. D. 355.

(2) (1879) 12 Ch. D. 839, 843.

(3) (1886) W. N. 125.

(4) [1904] 1 Ch. 161.

(5) 34 Ch. D. 345.

(6) (1884) 53 L. J. (Ch.) 972.

that case, also a decision of Kay J., one of the creditors was present and the Court appointed him to represent all the creditors. It was there held that, in the absence of evidence that the plaintiff himself was unable to pay the costs, the order ought not to direct the costs to be raised out of the fund, but merely to give liberty to the solicitors to apply as to raising them. Here the original defendant is bankrupt, the plaintiff is quite impecunious, and the partnership action is derelict.

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A solicitor's charging order was made by Joyce J. in *Ridd v. Thorne* (1), notwithstanding previous orders in the form of *Kewney v. Attrill*, and the practice and the effect of the order were there discussed. In that case no unsecured creditor was present.

I submit that in relation to a solicitor's charging order the creditors have no locus standi at all; they have only a right to share in what is left of the assets after the charging orders are satisfied. I do not contend that my order has priority over the order in favour of the other solicitors, as it was due to them equally that the property was preserved. [He also referred to *Dakin v. Crowder*. (2)]

A. G. Coulson for the solicitors to the defendant trustee in bankruptcy adopted the same argument.

J. A. Mackintosh and J. A. Brightman for Messrs. Mills, Lockyer & Co. Under their *Kewney v. Attrill* order, which is the earliest in date of the several orders, these creditors are entitled to priority over all other general creditors. The effect of a partnership action is that the Court takes over the administration of the partnership assets only as between the partners themselves. It has no analogy to an administration action at all. Having recovered judgment, these creditors were only prevented from enforcing it by the appointment of a receiver. The effect of the *Kewney v. Attrill* order is exactly the same as if we had taken the property in execution and sold it. I do not dispute the priority of the charging orders obtained under the Solicitors Act, 1932, but subject to this, these creditors are entitled to priority over all other creditors.

(1) [1902] 2 Ch. 344.

(2) Farwell J., Oct. 26, 1932 (1930-D-2770) (unreported).

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Milner Holland for Dulcetto-Polyphon, Ltd., one of the unsecured creditors. The position of a solicitor who acts for parties in an action where assets are recovered or preserved is that he can obtain priority by a charging order in certain conditions: (1.) it must be shown that it was by his exertions that the assets were preserved, and (2.) it must be shown that the client himself is unable to discharge his solicitors' bill. Here the original defendant is admittedly bankrupt, but there is no evidence as to the position of the plaintiff or of his ability to pay: see *Ridd v. Thorne*. (1)

There is no evidence that it was by any action on the part of the defendant trustee's solicitors that the assets of the firm were recovered or preserved. The receiver was appointed at the instance of the plaintiff.

[EVE J. I think I must treat the case on the assumption that the defendant trustee's solicitors assisted in the preservation of the assets.]

As to creditors who have obtained a *Kewney v. Attrill* order, it cannot be said that they have no locus standi, though their position is not the same as in an administration action.

I submit that no order should be made on the petition except one for the payment of the solicitors' charges. The fund cannot be distributed until all the creditors are ascertained. An order in the *Kewney v. Attrill* form gives no priority to the creditor obtaining it over the general body of creditors: see the arguments of counsel and the report of the case in 56 L. J. (Ch.) at p. 448. The object of the order is to protect the creditors who obtain it against the title of a trustee in bankruptcy, in case bankruptcy supervenes; when their claim might be swamped by subsequent debts of which they could have no notice. In *Ridd v. Thorne* (1) Joyce J. was only dealing with the question of priority as between a *Kewney v. Attrill* order and a charging order under the Solicitors Act. No ordinary creditors were present. A salvage charge always obtains priority. If a *Kewney v. Attrill* order gives priority, all the creditors of an insolvent

partnership will rush to obtain one as soon as possible and then claim to rank in order of date.

J. A. Mackintosh in reply referred to *In re Gershon & Levy*. (1) The appointment of a receiver does not make for equality among creditors. The effect of a *Kewney v. Attrill* order is to protect my client from competition with unsecured creditors, and make him a secured creditor in bankruptcy.

G. D. Johnston replied.

The plaintiff and the defendants did not appear.

Cur. adv. vult.

1936. Nov. 4. EVE J. Since this matter was last before the Court I have had the opportunity of inspecting a number of orders made on applications similar to the one now standing for judgment. The bulk of those applications were made on summonses, the amount involved being less than 1000*l*. Here the funds in Court exceed that limit, and the matter has had to be dealt with by petition. I find nothing in the cases I have looked into to alter the conclusion at which I arrived before the Vacation, namely, that obtaining a *Kewney v. Attrill* order gives no priority over the general body of creditors to the creditor obtaining it. The charging orders obtained under the Solicitors Act, 1932, have been properly made against the creditors of the partnership, and subject to the payment of the costs of this application, must rank in front of the other claimants: *Jackson v. Smith*. (2) The balance of the fund must be distributed pro rata among the creditors of the business, and as the receiver's security has been discharged there must be some special order made for payment to each creditor of his respective share, and there must be a schedule of all the creditors entitled to receive any sum proved and exhibited, and therein will be stated the pro rata amount to be paid to each.

H. L. L.

Messrs. Mills, Lockyer & Co. appealed. The appeal was heard on January 11, 1937.

(1) [1915] 2 K. B. 527.

(2) 53 L. J. (Ch.) 972.

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C. A. The only question on the appeal was whether the charging
1937 order in their favour gave them priority over the general
NEWPORT unsecured creditors.

Norman Daynes K.C. and *J. A. Brightman* for the
 appellants, and

Milner Holland for Dulcetto-Polyphon, Ltd., substantially
repeated the arguments on behalf of these parties in the Court
below.

Neither the petitioner nor the solicitors for the defendant
trustee in bankruptcy appeared.

LORD WRIGHT M.R. This is an appeal from a portion of
an order of Eve J. With the greatest respect to that learned
judge I feel myself unable to come to the conclusion at which
he has arrived. If it were not that he has come to a different
conclusion, and that a good deal of unnecessary confusion
seems to be imported into these questions by a form of order
which is open to some criticism, I should have thought it a
reasonably simple case. The sole question here is whether
the appellants, Messrs. Mills and Evill, are entitled to have
the relative priority which Eve J. has refused to give to
them, as against the general body of the creditors of the
partnership in question. [His Lordship then stated the facts
and continued:] Eve J. has held that, notwithstanding the
order of Bennett J., the present appellants have no claim at
all to rank in priority to the general body of creditors, and
it is against that order that this appeal is brought.

The learned judge dealt with the matter very shortly.
He said: "I find nothing in any of the cases I have looked
into to change the conclusion at which I arrived before the
Vacation—namely, that the obtaining of a *Kewney v. Attrill*
order"—that seems to be a stereotyped form for describing
such an order as Bennett J. made in this case—"gives no
priority to the creditor obtaining it over the general body of
creditors." It is there, with the greatest respect, that I find
myself taking a different view from the learned judge. The
case of *Kewney v. Attrill* (1) contains a judgment of Kay J.,

(1) 34 Ch. D. 345.

and also, according to the report in the Law Reports, certain interlocutory observations which he is reported to have made. The reports in the Law Times (1) and in the Law Journal (2), to which we have been referred, differ in some respects, but, as I understand them, not in principle. Kay J. is first reported as having said by way of interlocutory observation (3): "By the appointment of a receiver the Court aims at equality amongst the creditors. If I give you leave"—that is, leave to issue execution—"it must be on your undertaking to hold the proceeds and deal with them in accordance with any order the Court may make." The judgment creditors had there applied for leave to issue execution under their judgment against the partnership assets in the hands of the receiver, and it had been ordered on December 7, 1886, that the application should stand over until the partnership assets had been ascertained. The application on which Kay J. pronounced on December 21, a fortnight afterwards asked that the order adjourning the proceedings should be discharged, and that either the applicants might be at liberty to issue execution against the partnership assets in the hands of the receiver, or the receiver should pay them their judgment debt and costs out of the assets. That application obviously presupposed that, in the interval of time between December 7 and December 21, the partnership assets had been ascertained and that there was no reason for any further delay. Mr. Alexander, arguing for the applicants, complained that the delay was endangering their rights, because if the partners were adjudicated bankrupt the applicants might lose their priority. At that time apparently no act of bankruptcy had been committed. It was with reference to that argument that, first of all, Kay J. said: "By the appointment of a receiver the Court aims at equality amongst the creditors." Stated broadly and generally, a receiver is appointed that the Court may keep its hands on the assets in order to deal with them. But there is some difficulty, to my mind, in seeing exactly how far that statement of Kay J. can be

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(1) 55 L. T. 805. (2) 56 L. J. (Ch.) 448 (s. n. *Kewney v. Atril*).
 (3) 34 Ch. D. 346.

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literally applied, because it is perfectly clear that in a partnership action such as that in question the Court was not concerned with administering the property in the interest of the creditors; it was dealing with the property as between the partners themselves.

That interlocutory observation is not reported in either of the other reports cited, and I find it a little difficult to give it a precise meaning or effect. What the learned judge, in effect, said was: "If I give you, as you ask, immediate leave to levy execution against the partnership assets, or if I make an immediate order that the receiver should pay them to you, that must be subject to an undertaking." Mr. Whitaker, for the partners, said: "It would save expense if the applicants took a charge on the assets instead of leave to issue execution." That was obviously a proposal alternative to the idea of issuing execution at once. Kay J. then said: "Very well—if there is a bankruptcy the trustee in bankruptcy will take subject to prior equities and therefore subject to a charge. I give the applicants, the judgment creditors, a charge now on the moneys which are in the hands of or may be taken possession of by the receiver, and they must undertake to deal with the charge according to the order of the Court. The charge will be for the judgment debt and costs and interest at 4 per cent., and the costs in Chambers and here." I stop there for a moment. What the learned judge was saying was: "If I give you a charge, the trustee in bankruptcy will take subject to prior equities, and, therefore, subject to a charge." I think that the learned judge meant: "The charge which I am now giving to you will involve a priority as against the trustee in bankruptcy—that is, as against the general body of creditors, but I am going to give you that charge." The ordinary form of order as drawn up is in this form: "This Court doth declare that the said A. B. is entitled to a charge for the amount of his judgment debt," and so on, "upon the assets which now are in or may hereafter come to the hands of the receiver in this action," and that is the effective part of the judgment of Kay J.

When I come to the order which Bennett J. has made in

the present case I find that he seems so far to follow exactly the language which is set out in Seton on Forms of Judgments and Orders, vol. i., 7th ed., p. 471. He uses the precise words describing the charge as being: "Upon the assets which now are in or may hereafter come to the hands of the receiver." He seems to have overlooked, and does not deal with the circumstance, that at that time, except for the sum of 13*l.* 1*s.*, all the assets were in Court, and not in the hands of the receiver at all. The order as drawn up, according to the precedent in Seton to which I have referred, goes on in a very curious manner, which appears to me to be most unusual. It says: "The intention of this Court being to preserve to the applicants such legal rights as they would have had if the sheriff had seized under the execution and sold on this day." That seems to take and to put into the order the language of Kay J., which is (1): "The intention of the Court is to preserve to the applicants all the rights which they would have had if they had issued execution, and the sheriff had seized and sold the assets to-day." That, no doubt, is a correct statement of what Kay J. had in mind and it may well be a good working rule for the direction of any other Court which has to deal with the problem of what disposition has to be made of a fund representing partnership assets which is either in the hands of the receiver or in the hands of the Court. In either event the Court wishes to secure, if it has not thought fit to order immediate payment out or immediate execution, as it might do, that the fund be dealt with according to the order of the Court; and therefore use is made of the essential words to be found in the order in Seton: "Submitting that such charge shall be dealt with in such manner as the judge shall direct." This is in accordance with the words of Kay J.: "They must undertake to deal with the charge according to the order of the Court." But it seems to me that the final words purporting to express the intention of the Court ought not to form any part of the operative order. In a partnership action of this nature where there is no bankruptcy at all the position is that the

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rights of the judgment creditor are not affected except to the extent that he has to obey the instructions and obtain the leave of the Court in which the action is proceeding. Equally, the bankruptcy of one partner will make no difference. But the mere fact of the receiver being appointed puts a certain responsibility on the Court in the disposal of the moneys in the partnership assets, and it is to give effect to that responsibility that the rule was established that execution is not to be levied, and that the moneys in the hands of the receiver are not to be paid out, without the leave of the Court, and accordingly the Court may and will impose this condition if it thinks it fit and proper so to do.

It is quite obvious that Bennett J., in making the order which he did granting a charge and not ordering immediate payment out, was not considering the general position of the estate or the various rights which arose and the possibility of preferential rights. He was not administering the estate in any sense ; he was merely making a charge the exact effect of which might require consideration in a later proceeding, as indeed in the application to Eve J. Eve J., when the matter came before him, was able to give effect to the preferential rights of the solicitors under their charging orders. But I think it is quite wrong to say that a charging order such as Bennett J. made in favour of Messrs. Mills and Evill in the present case does not give a priority to the person who gets the charge as against the general body of the creditors. And if I may refer again to Kay J.'s judgment, I think it is quite clear that he was intending to give a priority which, so far as it was necessary for him to go at that stage, was in favour of the judgment creditors.

I think that the appeal ought to be allowed.

ROMER L.J. I agree. I think that the difficulty which has arisen in the present case is largely due to the fact that in the Law Reports an interlocutory observation is, as I think, attributed to Kay J. erroneously. I think that the reporter must have misunderstood what fell from that learned judge's lips, because the observation does not appear in the

report either in the Law Journal or in the Law Times. The observation was this (1): "By the appointment of a receiver"—Kay J. was referring to the appointment of a receiver in an action between partners for dissolution—"the Court aims at equality amongst the creditors." The true position of creditors in an action for dissolution between partners was correctly expressed by Chitty J. in *Mitchell v. Weise* (2): "A suit between partners for winding up the partnership business was a suit between the parties themselves in their own individual rights, and the creditors of the firm had no interest whatever in such action." He then pointed out the difference between such an action and proceedings to wind up a company. He might also have referred to the difference between such an action and proceedings for the administration of the estate of a deceased person. The creditors have no locus standi in an action for dissolution of a partnership. On the other hand they are not in any way affected by the decree for dissolution.

After the decree for dissolution a creditor of the partnership is entitled to pursue the partners to judgment and, unless a receiver has been appointed of the partnership assets, he can proceed to levy execution on the partnership assets. Of course, where the Court has appointed a receiver, nobody can touch the assets except with the leave of the Court, but the Court will in certain cases grant leave to issue execution notwithstanding the appointment of a receiver. That, however, is very often an inconvenient order to make, and a preferable form is to direct the receiver to pay the execution creditor out of net assets in his hands—that is, out of moneys in his hands representing the assets or the proceeds of sale thereof, after deducting the costs of realization and the remuneration of the receiver and so forth. Yet another alternative is open to the Court, and is that which was adopted by Kay J. in *Kewney v. Attrill* (3), namely, to give the judgment creditor a charge on the net partnership assets. Whichever of the two alternatives to giving leave to issue execution be

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(1) 34 Ch. D. 345, 346.

(2) [1892] W. N. 139.

(3) 34 Ch. D. 345.

C. A. adopted, the object is the same. It is to give the judgment creditor priority over creditors who have not proceeded to judgment.

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When the second alternative is adopted the order very frequently contains, as in the present case, a declaration that the intention of the Court is to preserve to the applicants all the rights which they would have had if they had issued execution and the sheriff had seized and sold the goods as on the day of the order. But, as pointed out by Mr. Holland in his argument, that does not correctly express the intention of the Court, because the Court would not, for instance, deprive the receiver of his remuneration, or make the costs of realization of the assets fall on the receiver or the parties to the action. Nor, as appears from authorities to which our attention has been called, does the giving of a charge prevent the Court from giving a solicitor a charging order in respect of his costs incurred in the action. Therefore I agree that in future it would be very much better that those words referring to the intention of the Court in making the order should be omitted, and that the applicant should give the undertaking, which is always embodied in these orders, only to deal with the charge given him by the order subject to the direction of the Court.

For these reasons, in addition to those which the Master of the Rolls has given, I agree that this appeal must succeed.

GREENE L.J. I agree.

Appeal allowed.

Solicitors : J. J. McIntyre ; G. B. Hemming & Son ; Mills, Lockyer, Church & Evill ; A. E. Samuels & Co.

H. C. G.

In re HALL'S SETTLEMENT TRUSTS.CLAUSON
J.SAMUELL *v.* LAMONT.1937
Jan. 28.

[1936. H. 3515.]

*Settlement—Trust to pay legacies bequeathed by settlor's "said will"—
Will revoked—Trusts of settlement declared irrevocable—Death of
legatees before settlor—Legacies not payable to legatees' personal
representatives.*

A settlement, without reciting any will, declared trusts for (inter alia) payment of the legacies bequeathed by the settlor's "said will," dated September 24, 1904. A will so dated was then in existence. The Court, in certain proceedings, pronounced the trusts which were declared by the settlement to take effect after the settlor's death to be irrevocable whether the will should be revoked or not. The will was afterwards revoked. Two legatees predeceased the settlor:—

Held, that, as the legatees had predeceased the settlor, the sums representing the legacies were not payable out of the funds then subject to the settlement to the legatees' personal representatives.

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On November 14, 1904, John Henry Hall (hereinafter called "the settlor"), settled a trust fund upon trust that his trustees should pay the income to himself during his life and after his death should pay and discharge thereout all debts and testamentary expenses and the legacies bequeathed under "the said will" of the settlor, dated September 24, 1904, in so far as any other the estate and property of the settlor at the time of his death should be insufficient: and, as to the residue of the trust fund, after payment of the said debts testamentary expenses and legacies if necessary as aforesaid upon the trusts and subject to the powers and provisions by and in "the said will" of the settlor dated September 24, 1904, contained and declared of and in respect of the settlor's residuary estate therein mentioned. There was, in the settlement, no recital about the will.

By the will the settlor gave to James Lamont a legacy of

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300*l.* and to Francis William Lawrence a legacy of 500*l.* both free of duty ; and he gave his residue upon trust (in the event, which happened, of his two sisters predeceasing him) for the child or children of his sister Jessie Margaret Welwyn as therein mentioned. The settlor, however, revoked the will during his lifetime.

In 1914 the settlor became bankrupt. Later the matter of the settlement came before the Court on an originating summons, and the trustee in bankruptcy suggested that in some shape or form he had a claim to have a sum raised out of the corpus of the trust fund in respect of the settlor's then debts. On the matter coming before the Court an order was made in 1918 by Sargant J. declaring that the trusts declared by the settlement to take effect after the settlor's death were absolute and irrevocable, whether the will should be revoked or should remain unrevoked until the settlor's death, and, accordingly, that the trustee in bankruptcy was not entitled, during the settlor's life, to have any sum raised out of the funds subject to the settlement for payment of the settlor's debts.

James Lamont, to whom the legacy of 300*l.* had been bequeathed by the revoked will, died on January 27, 1933 ; Francis William Lawrence, to whom the legacy of 500*l.* had been thereby bequeathed, on October 12, 1933 ; and the settlor on March 2, 1936.

By various assignments Eileen Margaret Herbert, a defendant to this summons was, at the date of this summons, entitled to the interest of the daughters of the settlor's sister Jessie Margaret Welwyn under the settlement.

By this summons, taken out on October 26, 1936, the trustees of the settlement, who were also the settlor's personal representatives, asked (*inter alia*) whether the personal representatives of James Lamont and of Francis William Lawrence, who were defendants to the summons, were respectively entitled to payment out of the trust funds subject to the settlement of the clear sums of 300*l.* and 500*l.*

Meyrick Beebee for the trustees.

L. W. Byrne for the personal representatives of the legatees. The persons to whom the legacies were given by the revoked will have become absolutely entitled. Therefore no question of lapse can arise and their personal representatives are thus absolutely entitled. The effect of what has been done is exactly the same as if the appropriate part of the will had been incorporated in the settlement. That is unquestionably the view which Sargant J. took when he made the order in 1918, as appears from the words of the order. The order is at any rate some guide as to what the learned judge then thought to be the correct method of construing the settlement. The will, as a testamentary instrument, never took effect at all.

H. E. Salt for Mrs. Herbert. The order of Sargant J., which is not binding on Mrs. Herbert, went no further than to declare that certain referential trusts were absolute and irrevocable. It did not declare that they might not be contingent: and, in the event which has happened, they have failed through the non-fulfilment of a certain contingency—namely, the survival of the settlor by the beneficiaries. If the words “legacies bequeathed” are translated from such an instrument as a non-effective will to a settlement inter vivos, they must be construed to mean that the legacies are payable only if the beneficiaries survive the settlor.

CLAUSON J. [after stating the facts:] It is odd that the settlement contains no recital about the will, to which it refers as “the said will,” and which was later revoked: but it is plain that that reference is to a will which was in existence at the date of the settlement. I read the settlement in the light of the order made by Sargant J. in 1918. It is plain that, under the settlement, children of Jessie Margaret Welwyn who survive the testator take the ultimate interest in the fund.

The question before the Court is whether a claim for payment of the legacies can be set up: and, bearing in mind that both legatees predeceased the settlor, I have to decide what trusts are applicable to the trust fund. It seems to me that there is a trust to pay those gifts of 300*l.* and 500*l.*

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CLAUSON J. to James Lamont and Francis William Lawrence as though they had been the legacies which they would have received under the will had it not been revoked, and with a corresponding liability to lapse. That involves the proposition that the settled fund must be administered on the footing that there is to be payment to the legatees of the legacies if they are alive at the settlor's death, but not otherwise.

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Accordingly, in my view, the personal representatives of the legatees are not, in the events which have happened, entitled to the sums of 300*l.* and 500*l.*

Solicitors : *Windybank, Samuell & Lawrence.*

K. R. A. H.

WILTSHIRE BACON COMPANY *v.* ASSOCIATED
CINEMA PROPERTIES, LIMITED.

FARWELL
J.

1936
Nov. 26.

[1936. W. 2893.]

Costs—Ancient lights—Action for injunction to restrain erection of building and for damages—Motion for injunction—Motion to stand over till trial of action—Cross undertakings by plaintiffs and defendants—Sum paid into Court by defendants without admitting liability—Plaintiffs' acceptance of sum and abandonment of claim for injunction—Order as to costs—R. S. C. Order XXII., r. 2, sub-r. 3.

The plaintiffs in an action claimed an injunction to restrain the defendants from continuing the erection of a building so as to be a nuisance or illegal obstruction to the ancient lights in the plaintiffs' premises. They also claimed damages. On October 7, 1936, a motion by the plaintiffs for an injunction in the terms of the writ came before the Court. The motion stood over till the trial of the action, the defendants giving a limited undertaking as to building and the plaintiffs the usual cross undertaking in damages; the costs of the motion were expressly reserved. On November 4 the defendants paid into Court the sum of 300*l.* without admitting liability. On November 12 the plaintiffs accepted the 300*l.* and abandoned their claim to an injunction. On the case coming before the Court on the question of costs only and the plaintiffs' cross undertaking in damages:—

Held, that it should be referred to the Taxing Master to tax:—(1.) the costs of the plaintiffs down to November 4, 1936, allowing such costs as would have been incurred if a statement of claim had been delivered; (2.) the costs of the defendants of the motion. These two sets of costs to be set off and the balance paid by the party from whom the balance should be certified to be due.

Held, further, that an inquiry should be made whether the defendants had sustained any and if so what damages by reason of their undertaking in the order of October 7, which the plaintiffs ought to pay according to their undertaking, and that the costs of the inquiry should be reserved.

THIS was an action in which the plaintiffs claimed an injunction to restrain the defendants from erecting or continuing the erection of a building so as to be a nuisance or illegal obstruction to the ancient lights of the plaintiffs' premises. They also claimed damages.

On October 7, 1936, a motion by the plaintiffs for an injunction in the terms of the writ came before Lewis J. The motion stood over till the trial of the action and the following order was made: the plaintiffs by their counsel

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undertaking (a) to abide by any order the Court might make as to damages, in case the Court should be of opinion that the defendants had sustained any by reason of their undertaking thereafter contained, which the plaintiffs ought to pay ; and (b) to set the action down for trial forthwith, and the defendants by their counsel undertaking until judgment in the action or until further order not to put on any additional workmen or otherwise increase the rate of construction of their proposed new premises, and on the plaintiffs and the defendants by their counsel consenting to the order, the Court ordered that the action should be tried on the issues raised in the affidavits filed on the motion. And it was ordered that the deponents to the affidavits should attend at the trial for examination and cross-examination. It was also ordered the plaintiffs and the defendants should be at liberty to read the affidavits at the trial and to call such further evidence as they might be advised. It was further ordered that the plaintiffs and the defendants should exchange lists of documents relating to the matters in question in the action within seven days from the date of the order and that all correspondence between the parties and their representatives should be treated as in evidence. And the plaintiffs and the defendants were to be at liberty to apply for a speedy trial of the action and the order was to be without prejudice generally. The costs of the motion were reserved to be dealt with at the trial.

On November 4, 1936, the defendants paid into Court the sum of 300*l.* without admitting liability. On November 12 the plaintiffs accepted the 300*l.*, and abandoned their claim for an injunction. The matter now came before the Court on the question of costs only and the plaintiffs' cross undertaking in damages.

Andrew Clark for the plaintiffs. The defendants denied all liability up to the time of the payment into Court. That justified the plaintiffs in bringing the motion, and it ought not to be assumed that if the action had gone to trial the plaintiffs would not have been granted an injunction.

Sir Herbert Cunliffe K.C. and *J. V. Nesbitt* for the defendants. FARWELL J.
 It is quite clear on the correspondence that took place between the parties before the action was commenced that the plaintiffs had no justification at all for launching the motion, and that in any event it must be assumed that by taking the money out of Court the plaintiffs admitted that they were not entitled to an injunction. In those circumstances it follows, as a matter of course, that the defendants are entitled to an inquiry as to the damages occasioned to them by reason of the undertaking which they gave on the motion.

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FARWELL J. The only matters with which I am now concerned are the questions of the costs and of the inquiry as to damages.

On November 4 the defendants gave notice of payment into Court without admitting liability and thereupon the plaintiffs obtained payment out to themselves and became entitled to the taxed costs of the action up to that date (Order XXII., r. 2, sub-r. 3); but those costs would not include the costs of the motion, which had been expressly reserved. When the motion came before the Court the defendants gave an undertaking to discontinue building to some extent and there was the usual cross undertaking as to damages, and the defendants now ask for an inquiry on that undertaking.

There is no evidence before me that the defendants have suffered any damage; but that can be got over by directing an inquiry as to the damages (if any), and in my judgment the defendants are entitled to an inquiry in that form, the costs being reserved. The plaintiffs have never established their right to the injunction which they sought and they are consequently liable to the defendants for any damages which they may have suffered as the result of the undertaking which the defendants gave. With regard to the costs, I have to deal with the costs of the motion, which were expressly reserved, but apart from those costs it has been suggested on behalf of the defendants that the plaintiffs are not entitled to all the costs of the action on the ground that there are really two causes of action in such a case as this, i.e., an

FARWELL J. action for damages and an action for an injunction and that the plaintiffs in the events which have happened are not entitled to any costs of the action which relate solely to the claim for an injunction. That contention, in my judgment, is not well-founded.

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In a case such as this there is one cause of action only—namely, the alleged nuisance—although there are two alternative forms of relief which the Court may grant, either by way of an injunction or damages, and there is consequently no ground for depriving the plaintiffs of any part of the costs of the action up to the date of payment into Court apart from the costs of the motion.

With regard to the costs of the motion other considerations apply. If a plaintiff in an action of this kind moves for an interlocutory injunction, he does so at his own risk as to costs, and, if on the motion he obtains an injunction and the costs are reserved, he may be liable to pay the costs of the motion if at the trial he fails to establish his right to an injunction and gets relief by way of damages only. That is not the position here because the action never came to trial; but the plaintiffs by taking the money out of Court in satisfaction of the whole claim must be taken to have abandoned their claim to an injunction with the same result as far as the costs are concerned as if they had sought an injunction and failed to obtain it. It follows, therefore, that the plaintiffs must pay the costs of the motion, but they are in my judgment entitled to some relief having regard to the course which the proceedings took.

By the order made on the motion it was ordered that no pleadings should be delivered and that the issue should be tried on the facts stated in the affidavits, with the result that some costs were saved, and I have to consider whether I ought not to allow something to the plaintiffs in respect of the costs which would otherwise have been incurred.

On the whole I think that the order must be in the following terms: that it be referred to the Taxing Master to tax:—

(1.) the costs of the plaintiffs of this action down to November 4, 1936 (the date of payment into Court);

(2.) the costs of the defendants of the motion reserved by FARWELL J. the said order dated October 7, 1936.

And in taxing the said costs of the plaintiffs the Taxing Master is to allow such costs as would have been incurred if a statement of claim had been delivered by the plaintiffs.

And the Taxing Master is to set off the said costs of the plaintiffs and the said costs of the defendants; and is to certify to which of them the balance after such set off is due.

And it is ordered that the said balance be paid by the party from whom the said balance shall be certified to be due to the other party.

And it is ordered that the following inquiry be made, that is to say :—

1. An inquiry whether the defendants have sustained any and if so what damages by reason of their undertaking contained in the said order dated October 7, 1936, which the plaintiffs ought to pay according to their undertaking in the said order mentioned.

The costs of the said inquiry are reserved.

And the parties are to be at liberty to apply.

Solicitors for the plaintiffs : *Sharpe, Pritchard & Co.*

Solicitors for the defendants : *H. S. Wright & Webb.*

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In re KEEN.EVERSHED *v.* GRIFFITHS.

[1935. K. 865.]

Will—Construction—Legacy—Secret trust—Objects of trust to be notified by testator in his lifetime—Trust in default of notification—Memorandum in sealed envelope handed to trustee before date of will—Opened after testator's death—Future unattested disposition—Trust invalid.

A testator by his will gave to his trustees 10,000*l.* to be held upon trust and disposed of among such person, persons or charities as he might notify to them during his lifetime, and in default of such notification to fall into the residue.

The testator had on the execution of an earlier will containing a similar clause which was revoked by the later one told one of his trustees that he desired to provide for a person whose name was to be kept secret, and that he had written the name and address of the proposed beneficiary on a sheet of paper enclosed in a sealed envelope which he then handed to the trustee to be kept with his will and not to be opened until after his death. The envelope remained in the trustee's possession and no further communication relating to it was ever made by the testator. After his death it was opened and found to contain a paper bearing the words "10,000*l.* to G.," giving a person's name and address. The other trustee until then was ignorant of the existence of the secret trust.

A summons having been taken out to determine whether a valid secret trust was created in favour of G., Farwell J. decided that there had been no notification of any person within the meaning of the will to the trustees by the testator during his lifetime :—

Held, by the Court of Appeal, that on the true construction of the will it reserved power to the testator to dispose of property by a future unattested disposition, contrary to the Wills Act, 1837. The trust sought to be established by parol evidence was one inconsistent with the terms of the will, the notification of it to the trustee being anterior to the will. The trust therefore failed and the legacy fell into residue.

Decision of Farwell J. affirmed on other grounds.

Blackwell v. Blackwell [1929] A. C. 318 discussed and distinguished.

APPEAL from a decision of Farwell J.

A summons was taken out by the plaintiff Edward Evershed, one of the executors and trustees of the will of the testator, Harry Augustus Keen, to determine whether

the defendant G. Griffiths was entitled to the sum of 10,000*l.* bequeathed by clause 5 of the will to the defendant C. A. C. Hazlehurst and the plaintiff upon trust as therein mentioned or whether in the events which had happened the sum fell into and formed part of the testator's residuary estate.

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The testator by his will dated August 11, 1932, after revoking all wills and testamentary dispositions at any time theretofore made by him, appointed his nephews, Charles Henry Keen and Charles Arthur Cheshyre Hazlehurst, and his friend Edward Evershed, to be executors and trustees of the will. Clause 5 of the will was in these terms: "I give to the said Charles Arthur Cheshyre Hazlehurst and Edward Evershed the sum of 10,000*l.* free of duty to be held upon trust and disposed of by them among such person, persons or charities as may be notified by me to them or either of them during my lifetime and in default of such notification and so far as such notification shall not extend I declare that the sum of 10,000*l.* or such part thereof as shall not be disposed of in manner aforesaid shall fall into and form part of my residuary estate." Then followed a charitable legacy, and a bequest of the residue.

It appeared from the evidence that in 1928 the testator made a will which contained a clause in terms identical with clause 5 set out above, except that the amount was 5000*l.* Mr. Evershed, who acted throughout as the testator's solicitor, gave evidence that the testator told him that he wished to leave a legacy to a person whose name he did not wish published in the will, but gave him no further information. He drafted the clause on those instructions. In March, 1932, the testator made a new will in which he altered the 5000*l.* in clause 5 to 10,000*l.*, and having previously said he would put a memorandum with the will giving the name of the person, address and amount, he did on March 31, 1932, when he signed the engrossment, bring a sealed envelope containing the memorandum addressed to Captain Hazlehurst and Mr. Evershed. It contained in fact, as was afterwards ascertained, a memorandum dated March 31, 1932, signed

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by the testator, containing the name and address of the lady, with the addition of the words "in accordance with the directions in my will" and the figure of 10,000*l.* The testator did not tell Mr. Evershed what were the contents of the memorandum, the envelope containing which was not to be opened until after his death; but Mr. Evershed understood, when he took the envelope, that he was accepting the terms of the directions contained in the memorandum which he believed to be a notification within the terms of clause 5 of the will of March, 1932. When in August, 1932, the will in question in the summons was executed, clause 5 was left unaltered. Mr. Evershed still retained the sealed envelope and still believed that the note which it contained constituted the notification referred to in clause 5 and still regarded himself as having undertaken and as being bound to apply the 10,000*l.* in accordance with the directions in the memorandum. The sealed envelope was kept with the will and was opened on the testator's death. It did not appear that Captain Hazelhurst was notified of these circumstances until after the death of the testator. Mr. Evershed held the sealed envelope as co-executor and co-trustee and not as solicitor of the testator.

The summons was heard by Farwell J. on May 21, 1936.

N. C. Armitage for the plaintiff.

Harold Christie K.C. and *G. P. Slade* for the defendant Griffiths.

H. B. Vaisey K.C. and *J. Neville Gray* for defendant residuary legatees.

FARWELL J. [after referring to the will and stating the facts, continued:] The question which I have to determine is whether this sum of 10,000*l.* is now held by Mr. Hazelhurst and Mr. Evershed upon trust for the lady, or whether it falls into and forms part of the residuary estate under the final terms of clause 5 of the will. As I have said, I have heard an interesting discussion relating to secret trusts, and several authorities have been referred to; but I think, in

the first place, before the necessity arises for considering those authorities and those principles, it is desirable to see what the testator himself has provided by the language which he has used. He has given to those two gentlemen the sum of 10,000*l.* "upon trust to be disposed of by them among such person, persons or charities as may be notified by me to them or either of them during my lifetime." If, on the true construction of that will, the testator was endeavouring to dispose of this sum of 10,000*l.* among persons or charities which were subsequently to be named by him to the gentlemen in question such a gift, in my judgment, would not be a valid gift, because no one is entitled to make a disposition of his property after his death by parol, and such disposition would not be, in my judgment, a good disposition. If, on the other hand, this testator had done no more than leave 10,000*l.* on trust for such persons as he had notified to those two people at the date of his will then it may be that such a gift would be a completely good one. But it is unnecessary for me to consider those principles of law, and for this reason: If I accept as admissible the evidence of Mr. Evershed, that evidence only shows that the persons or charities who were to be the recipients of the gift were never notified to him or to Captain Hazelhurst during the lifetime of the testator, and there being no such notification as was required in order to entitle any person to take under this trust, it must necessarily follow that the alternative trust is to take effect—namely, that the 10,000*l.* falls into, and forms part of the residuary estate. I was invited to say that, in the language the testator has used, one must look at it as though it was used at the point of death, and not when this will was made. Even if I were so to consider it, there yet remains the fact that at the moment when the testator died there had been no notification that the person, or persons, in fact existed. Mr. Evershed had been told at some time before this will was made that the testator desired to benefit some lady, but that is not a notification of the person who is to benefit. In my judgment, as I say, it seems to me the claim put forward on behalf of

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C. A. the first defendant must fail, because she is unable to prove
 1936 that she is a person who has been notified to these two
 KEEN, gentlemen in the lifetime of the testator, and there being
 In re. no communication such as provided for by the will, the
 EVERSHED 10,000*l.* must be held upon trust for the persons who take
 v. the residuary estate, and I so declare and hold.
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C. A. The defendant Griffiths appealed. The appeal was heard
 on December 14, 15, 16, 1936.

Roxburgh K.C. and *G. P. Slade* for the appellant. The trust is valid and ought to be enforced by the Court. The case comes within the decision of the House of Lords in *Blackwell v. Blackwell*. (1) It is sufficient for the testator to have told the trustee that he is creating a trust and to have given him a document which will tell him all he needs to know about it. The document was a "notification" to the trustee within the terms of the will. The words of futurity in the present will are quite capable of being applied to a communication already made to the trustee.

The document was given to the plaintiff Evershed as a trustee, and he promised the testator that he would carry the trust into effect. The fact that he did not then know the terms of the document does not make any difference to its validity. See *In re Fleetwood* (2); *In re Huxtable*. (3)

It is admitted that evidence cannot be given to contradict an express trust.

While the will here is wide enough to include a subsequent notification it is also wide enough to include a contemporaneous notification. The testator evidently thought he had a free hand in the matter until his death. There is here, it is submitted, a valid secret trust in favour of the appellant. In *In re Boyes* (4) there was a clear reference to future directions.

The trust in the will is not the trust which the Court is asked to enforce. In *In re Hawksley's Settlement* (5) there were words of futurity used. See also *Riordan v. Banon*. (6)

(1) [1929] A. C. 318.

(2) (1880) 15 Ch. D. 594.

(3) [1902] 2 Ch. 793.

(4) (1884) 26 Ch. D. 531, 535.

(5) [1934] 1 Ch. 384, 399.

(6) (1876) Ir. R. 10 Eq. 469.

[GREENE L.J. referred to *Johnson v. Ball* (1) and *In re Gardner*. (2)]

It is admitted that the trust outside the will must not be inconsistent with anything in the will.

McCormick v. Grogan (3) shows that it is not necessary that the trustee should have actually seen the document. It is sufficient if the terms should have been communicated to him.

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[They also referred to *Davenport v. Coltman*. (4)]

Vaisey K.C. and *J. Neville Gray* for the respondents. The decision of the learned judge was correct. The case turns upon the true construction of clause 5 of the will. The language used shows that the testator contemplated a future notification of the object of the trust. But no such notification was ever given, or if it was it was ineffective: *In re Boyes*. (5)

The language of the will is not merely future, but hypothetical. The testator reserved power to himself to give such a notification as to exhaust the fund of 10,000*l.*, or alternatively to exhaust it partially, or he might give no notification at all. He never regarded the notification as having already been given by him. If he had given any notification, then the will suggests that any such, already given, was abrogated and superseded. The defendant Evershed thought that the sealed envelope already in his possession would be the notification contemplated by the will, if it were communicated to him.

The present case is an attempt to extend the doctrine of secret trusts, and is very like *Johnson v. Ball* (1), which was not overruled in *Blackwell v. Blackwell*. (6) There the Vice-Chancellor (Parker V.-C.) said in his judgment: "A testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil." That applies to the present case.

(1) (1851) 5 De G. & Sm. 85.

(2) [1920] 2 Ch. 523.

(3) (1869) L. R. 4 H. L. 82.

(4) (1842) 12 Sim. 588, 610.

(5) 26 Ch. D. 531.

(6) [1929] A. C. 318.

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 KEEN, *N. C. Armitage* for the plaintiff. The memorandum was
In re. not admitted to probate.
 EVERSHERD *Roxburgh K.C.* in reply. The present case is governed by
v. *Blackwell v. Blackwell*. (2) *In re Hetley* (3), which was
 GRIFFITHS. explained in that case, was quite a different case from this
 one. There was in that case nothing in writing apart from
 the will, the secret trust set up being verbal.

Cur. adv. vult.

1937. Jan. 21. LORD WRIGHT M.R. [after reading clause 5 of the will and stating the facts substantially as above set out, continued:] The summons came before Farwell J., who decided adversely to the claims of the lady on the short ground that she could not prove that she was a person notified to the trustees by the testator during his lifetime within the words of clause 5. His opinion seems to be that the clause required the name and identity of the lady to be expressly disclosed to the trustees during the testator's lifetime so that it was not sufficient to place these particulars in the physical possession of the trustees or one of them in the form of a memorandum which they were not to read till the testator's death.

I am unable to accept this conclusion, which appears to me to put too narrow a construction on the word "notified" as used in clause 5 in all the circumstances of the case. To take a parallel, a ship which sails under sealed orders, is sailing under orders though the exact terms are not ascertained by the captain till later. I note that the case of a trust put into writing which is placed in the trustees' hands in a sealed envelope, was hypothetically treated by Kay J. as possibly constituting a communication in a case of this nature: *In re Boyes*. (4) This, so far as it goes, seems to support my conclusion. The trustees had the means of knowledge

(1) [1908] P. 140.

(2) [1929] A. C. 318.

(3) [1902] 2 Ch. 866.

(4) 26 Ch. D. 531, 536.

available whenever it became necessary and proper to open the envelope. I think Mr. Evershed was right in understanding that the giving of the sealed envelope was a notification within clause 5:

This makes it necessary to examine the matter on a wider basis, and to consider the principles of law which were argued both before Farwell J. and this Court, but which the judge found it merely necessary to mention. There are two main questions: first, how far parol evidence is admissible to define the trust under such a clause as this, and, secondly and in particular, how far such evidence if admissible at all would be excluded on the ground that it would be inconsistent with the true meaning of clause 5.

It is first necessary to state what, in my opinion, is the true construction of the words of the clause.

These words, in my opinion, can only be considered as referring to a definition of trusts which have not yet at the date of the will been established and which between that date and the testator's death may or may not be established. Mr. Roxburgh has strenuously argued, basing himself in particular on the word "may," that the clause even though it covers future dispositions, also includes a disposition antecedent to or contemporaneous with the execution of the will. I do not think that even so wide a construction of the word "may" would enable Mr. Roxburgh's contention to succeed, but in any case I do not feel able to accept it. The words of the clause seem to me to refer only to something future and hypothetical, to something as to which the testator is reserving an option whether to do or not to do it.

It must then be considered whether the first paragraph of the clause can be held valid as a testamentary disposition. It is said on behalf of the residuary legatees, some of whom are infants, that it cannot, and that the only trust which takes effect is that which operates in their favour in the event of the provisions of the first part of the clause proving ineffective.

The principles of law or equity relevant in a question of this nature have now been authoritatively settled or discussed

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C. A. by the House of Lords in *Blackwell v. Blackwell*. (1) In
 1937 1869 in *McCormick v. Grogan* (2) the House of Lords had
 KEEN, held that a secret trust, that is a trust created by an
In re. expression of the testator's wishes communicated to and
 EVERSHED accepted by the legatee, bound the conscience of the legatee,
v. though in the terms of the will the bequest was absolute.
 GRIFFITHS. Such a trust was held to be altogether outside the will; the
 Lord Wright will took effect according to its terms and the property passed
 M.R. absolutely to the legatee: but the Court, it was held, would
 compel the legatee to apply that property according to the
 undertaking he had assumed to carry out the wishes of the
 testator. It would be a fraud or breach of faith not to fulfil
 the undertaking which the legatee had given to carry out the
 purposes for which the bequest to him was made.

No complication was involved in such a case by reason
 of s. 9 of the Wills Act, 1837. The testamentary
 disposition, which had been duly attested, received full effect.
 But a different question had to be considered when in the will
 itself the property was left to the legatee in trust, but neither
 the nature of the trust nor its beneficiaries were defined in
 the will. That was the case decided in *Blackwell v. Blackwell*. (1)
 There was in that case a bequest to trustees to apply the
 income "for the purposes indicated by me and at any time
 to pay part of the corpus to such person or persons indicated
 by me as they think fit, the balance to fall into the residuary
 estate." The testator had by parol at or before the execution
 of the will indicated or defined the nature of the trust and the
 beneficiaries and the trustees had accepted the trust on those
 terms. It was held that parol evidence was admissible to
 explain the trusts and to prove that the trustees had accepted
 the legacy on the condition of fulfilling them. The trusts
 were accordingly, when thus established, proper to be enforced
 by the Court. There was, it was held, in such a case no
 conflict between the express terms of the will and the actual
 trusts intended, and the evidence was not admitted to add to
 or vary or contradict what the will said or to fill up blanks

(1) [1929] A. C. 318.

(2) L. R. 4 H. L. 82.

in it or to specify what was left vague. As Lord Sumner said (1): "It is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provision of the Wills Act, and brings it within the law of trusts, as applied in this instance to trustees, who happen also to be legatees." The conclusion thus was that just as much as in the case of a secret trust of the type discussed in *McCormick v. Grogan* (2) the conscience of the legatee was affected; it made no difference whether according to its terms the will left the property to the legatee absolutely or on a trust which the will did not specify. The essential conditions were that the trust had been disclosed to the legatee as the testator's object in leaving the property and had been accepted by him.

So it was held by the House of Lords following a series of decisions since 1688, first under the Statute of Frauds and later under the Statute of Wills, which was held to have made no change in the law in this respect. Doubts had been expressed by eminent lawyers as to the correctness of these earlier decisions, but they were thus disposed of by the House of Lords in *Blackwell v. Blackwell* (3); the general equitable jurisdiction to prevent a breach of faith or the failure of a trust duly declared and accepted, was held to override the technical objections. Lord Sumner stated his conclusion, which agreed with that expressed in the speeches of Lord Buckmaster and Lord Warrington, in the following words (1): "Accordingly I think the conclusion is confirmed, which the frame of s. 9 of the Wills Act seems to me to carry on its face, that the legislation did not purport to interfere with the exercise of a general equitable jurisdiction, even in connection with secret dispositions of a testator, except in so far as reinforcement of the formalities required for a valid will might indirectly limit it. The effect, therefore of a bequest being made in terms on trust, without any statement in the will to show what the trust is, remains to be decided by the law as laid down by the Courts before and since the Act and does not depend on the Act itself."

(1) [1929] A. C. 339.

(2) L. R. 4 H. L. 82.

(3) [1929] A. C. 318.

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But he goes on to add qualifications which are essentially relevant for the determination of the present case. These are qualifications which flow from the circumstance that the will is not completely silent as to the trust, as is the case in wills of the type discussed in *McCormick v. Grogan* (1), but does in express terms indicate that there is a trust. The qualifications are thus stated by Lord Sumner (2): "The limits, beyond which the rules as to unspecified trusts must not be carried, have often been discussed. A testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime: *Johnson v. Ball* (3); *In re Boyes* (4); *Riordan v. Banon* (5); *In re Hetley*. (6) To hold otherwise would indeed be to enable the testator to 'give the go-by' to the requirements of the Wills Act, because he did not choose to comply with them."

As in my judgment clause 5 should be considered as contemplating future dispositions and as reserving to the testator the power of making such dispositions without a duly attested codicil simply by notifying them during his lifetime, the principles laid down by Lord Sumner must be fatal to the appellant's claim. Indeed they would be equally fatal even on the construction for which Mr. Roxburgh contended, that the clause covered both anterior or contemporaneous notifications as well as future notifications. The clause would be equally invalid, but, as already explained, I cannot accept that construction. In *Blackwell v. Blackwell* (7); *In re Fleetwood* (8) and *In re Huxtable* (9), the trusts had been specifically declared to some or all of the trustees at or before the execution of the will and the language of the will was consistent with that fact. There was in these cases no

(1) L. R. 4 H. L. 82.

(2) [1929] A. C. 339.

(3) 5 De G. & Sm. 85.

(4) 26 Ch. D. 531.

(5) Ir. R. 10 Eq. 469.

(6) [1902] 2 Ch. 866.

(7) [1929] A. C. 318.

(8) 15 Ch. D. 594.

(9) [1902] 2 Ch. 793.

reservation of a future power to change the trusts, in whole or in part. Such a power would involve a power to change a testamentary disposition by an unexecuted codicil and would violate s. 9 of the Wills Act. This was so held in *In re Hetley* (1). *Johnson v. Ball* (2) is again a somewhat different example of the rule against dispositions made subsequently to the date of the will in cases where the will in terms leaves the property on trust, and shows that the position may be different from the position where the will in terms leaves the gift absolutely. The trusts referred to but undefined in the will must be described in the will as established prior to or at least contemporaneously with its execution.

But there is still a further objection which in the present case renders the appellant's claim unenforceable; the trusts which it is sought to establish by parol evidence would be inconsistent with the express terms of the will. That such an objection is fatal appears from the cases already cited, such as *In re Huxtable*. (3) In that case an undefined trust of money for charitable purposes was declared in the will as in respect of the whole corpus, and accordingly evidence was held inadmissible that the charitable trust was limited to the legatee's life so that he was free to dispose of the corpus after his death. Similarly in *Johnson v. Ball* (2) the testator by the will left the property to trustees upon the uses contained in a letter signed "by them and myself": it was held that evidence was not admissible to show that though no such letter was in existence at the date of the will, the testator had made a subsequent declaration of trust; the Court held that these trusts could not be enforced. Lord Buckmaster in *Blackwell's* case (4) described *Johnson v. Ball* (2) as an authority pointing to "a case where the actual trusts were left over after the date of the will to be subsequently determined by the testator." That in his opinion would be a contravention of the Wills Act. I know of no authority which would justify such a contravention. Lord Buckmaster also quotes (5):

(1) [1902] 2 Ch. 866.
 (2) 5 De G. & Sm. 85.
 (3) [1902] 2 Ch. 793.

(4) [1929] A. C. 331.
 (5) *Ibid.* 330.

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the grounds on which Parker V.-C. based his decision as being both "that the letter referred to in the will had no existence at the time when the will was made and that supposing it referred to a letter afterwards signed it is impossible to give effect to it as a declaration of the trusts, since it would admit the document as part of the will and it was unattested."

In the present case, while clause 5 refers solely to a future definition or to future definitions of the trust subsequent to the date of the will, the sealed letter relied on as notifying the trust was communicated (as I find the facts) before the date of the will. That it was communicated to one trustee only and not to both would not, I think, be an objection (see Lord Warrington's observation in the *Blackwell* case) (1). But the objection remains that the notification sought to be put in evidence was anterior to the will and hence not within the language of clause 5, and inadmissible simply on that ground as being inconsistent with what the will prescribes.

It is always with reluctance that a Court refuses to give effect to the proved intention of the testator. In the present case it may be said that the objection is merely a matter of drafting and that the decision in *Blackwell v. Blackwell* (2) would have been applicable if only clause 5 had been worded as applying to trusts previously indicated by the testator. The sealed letter would then have been admissible, subject to proof of the communication and acceptance of the trust. This may be true, but the Court must deal with the matter as in fact it is. It would be impossible to give effect to the appellant's contention without not merely extending the rule laid down in *Blackwell v. Blackwell* (2), but actually contravening the limitations which have been placed on that rule as necessarily arising from the Wills Act and, in addition, from the fact that the conditions prescribed by the will cannot be contradicted.

The appeal must be dismissed and the decision of Farwell J. affirmed.

(1) [1929] A. C. 341.

(2) Ibid. 318.

ROMER L.J. I agree and have nothing to add.

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GREENE L.J. I agree.

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Solicitors: *Preston, Lane-Claypon & O'Kelly; Field,*
Roscoe & Co., for Evershed & Tomkinson, Birmingham.

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[1934. P. 858.]

Ecclesiastical Law—Church in Wales—Incumbent's right to annuity arising from tithe rentcharge—Emoluments of office—Institution of Incumbent to another parish—Income derived from trust under will for incumbent for time being of latter parish—Person holding an ecclesiastical office in Church in Wales—Representative Body of Church in Wales—Whether possessing statutory powers to deduct income derived under will from annuity—Commutation of existing interests—Welsh Church Act, 1914 (4 & 5 Geo. 5, c. 91), ss. 13, 14, 15, 18, and 38—Welsh Church (Temporalities) Act, 1919 (9 & 10 Geo. 5, c. 65), ss. 2 and 3.

The plaintiff was at the date of the coming into force of the Welsh Church Act, 1914, rector of the parish of C. in the county of Glamorgan. The emoluments of his office included tithe rentcharge and an annual sum derived from the redemption of tithe rentcharge amounting to the total annual sum of 528*l.* 13*s.* 6*d.* In 1933 the plaintiff resigned the rectory of C. on being instituted as vicar of another parish, namely, P., the incumbent of which was entitled under the trusts of the will of one N., who died in 1917, to the perpetual annual income derived from the investment of a legacy thereby bequeathed to the vicar for the time being. This annual income amounted to the sum of 121*l.* 13*s.* 6*d.*

By his statement of claim the plaintiff claimed a declaration that, so long as he held the office of vicar of P. or any other ecclesiastical office in the Church in Wales, he was entitled to the full annual sum of 528*l.* 13*s.* 6*d.*, and that the defendants were not entitled—so long as he held the office of vicar of P.—to deduct from the said annuity the amount of the income to which he, as incumbent of the parish of P., was entitled under the trusts of N.'s will. The defendants claimed that the plaintiff was only entitled to the annual sum of 528*l.* 13*s.* 6*d.*, and that he must bring into account the amount of the said income payable to him as incumbent of P. in respect of the legacy under N.'s will :—

Held, that under the commutation scheme contained in s. 18 of the Welsh Church Act, 1914, the plaintiff was entitled to the annual sum of 528*l.* 13*s.* 6*d.* without any deduction so long as he held an ecclesiastical office in the Church in Wales, but that this right was subject to any arrangement come to between the plaintiff and defendants under s. 18, sub-cl. (e), and also to any constitutions or regulations made by the defendants affecting the plaintiff's rights. His Lordship found as a fact that no such arrangement was come to between the plaintiff and the defendants nor had any constitutions or regulations been made by the

defendants which affected the plaintiff's right and held that the plaintiff was therefore not liable to bring into account the income payable to him as incumbent of P. in respect of the legacy under N.'s will.

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THE following statement of facts is taken from the judgment of the learned judge:—

“On September 18, 1914, the day on which the Welsh Church Act, 1914, was passed, the plaintiff held the office of rector of the parish of Coity with Nolton Chapel in the county of Glamorgan. The emoluments of the office at that date included, among other things, tithe rentcharge to the total annual value of 520*l.* 4*s.* 1*d.* and an annual sum of 8*l.* 9*s.* 5*d.* derived from investments representing the proceeds of the redemption of tithe rentcharge effected before that date. The plaintiff continued to hold the office of rector of Coity with Nolton Chapel until his resignation on July 2, 1933. On July 3, 1933, he was instituted and inducted to the office of vicar of Penmark.

On April 18, 1934, the plaintiff started this action against the Representative Body of the Church in Wales, a corporation incorporated by Royal Charter under the provisions of the Welsh Church Act, 1914. The relief claimed is a declaration that the plaintiff is entitled to have paid to him by the defendants an annuity of 528*l.* 13*s.* 6*d.* so long as he holds the office of vicar of Penmark or any other ecclesiastical office in the Church in Wales, and that so long as he holds the office of vicar of Penmark the defendants are not entitled to deduct from the annuity of 528*l.* 13*s.* 6*d.* any sum payable to him under the trusts declared by the will of a Dr. George Neale, who died on September 15, 1917. Dr. Neale had by his will bequeathed a legacy of 6000*l.* upon trust for investment and payment of the income in perpetuity to the incumbent for the time being of the parish of Penmark. At the date of the plaintiff's institution and induction as vicar of Penmark, this legacy was represented by a sum of 4866*l.* 17*s.* 2*d.* 3 per cent. Conversion Stock standing in the name of the Official Trustee of Charity Funds.

The defendants claim that the plaintiff is only entitled to

LUXMOORE J. receive while he is vicar of Penmark a total annual sum of 52*l.* 13*s.* 6*d.*, and must bring into account against it the income he receives from Dr. Neale's bequest.

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The annuity of 52*l.* 13*s.* 6*d.* is payable under the provisions of the Welsh Church Act, 1914, as amended by the Welsh Church (Temporalities) Act, 1919, relating to the commutation of what are described in the first named Act as 'the existing interests of the holders of ecclesiastical offices in the Church in Wales' in certain classes of property defined in that Act. The particular class of property in the present case is tithe rentcharge and all payments in lieu of or in the nature of tithes or tithe rentcharge."

Hon. Sir Stafford Cripps K.C., R. Gwyn Rees and G. Granville Slack for the plaintiff. Several questions of importance arise for the decision of the Court. The principal one concerns the construction of the Welsh Church Act, 1914, as amended by the Welsh Church (Temporalities) Act, 1919. The defendants are not entitled to make the deduction they did when the plaintiff was instituted as the vicar of Penmark—namely, the amount of 121*l.* 13*s.* 6*d.*, part of the sum derived from the investments arising under the trusts of the will of Dr. George Neale. So long as the plaintiff holds the office of vicar of Penmark or indeed any ecclesiastical office in the Church in Wales, he ought to be paid the full amount paid to him when rector of Coity—namely, 52*l.* 13*s.* 6*d.*; (compare the Welsh Church Act, 1914, s. 14, sub-s. 1 (proviso), and sub-s. 2).

Another question is as regards the making of rules and regulations by the defendants. It is submitted that the governing body of the Church in Wales has no power under the Act to make any financial rules or regulations with the exception of rules which affect the procedure which govern their meetings.

Sect. 13 of the Act of 1914 is the section under which the representative body of the Church in Wales is constituted. This body also could not under that section make regulations affecting the payments to which the plaintiff is entitled. The constitutions and regulations which under sub-s. 1 of

that section they could make for (inter alia) the general management of the property of the Church are only those which might be said to be similar to all other assemblies' rules or regulations. They are not intended to deprive clergy holding benefices in the Welsh Church of such rights as the plaintiff has in the emoluments of an ecclesiastical office in Wales.

The question now before the Court really relates to the construction of s. 18 of the Act of 1914, which, it is submitted, is decisive (see sub-cl. (e)), and which virtually decides the point in favour of the plaintiff. The section deals with the provisions as to commutation, and by sub-cl. (e) the holder of any ecclesiastical office in the Church in Wales shall—subject to any arrangements which may be made between him and the representative body—be entitled in lieu of his existing interest in such property as in the section mentioned (namely, property held by freehold tenure) to an annuity calculated as laid down in the section, so long as he continues to hold an ecclesiastical office in the Church in Wales. Under this section the defendants are bound to pay the annuity in full. Any resolutions which it is alleged were made cannot deprive the plaintiff of this annuity.

Gavin Simonds K.C., W. N. Stable K.C., and F. H. L. Errington for the defendants. The question is one of construction of the Acts of 1914 and 1919. Resolutions had been passed in pursuance of the Act of 1914 by the representative body dealing with such situations as (for example, in the case now before the Court) might arise. If any member of the Church in Wales who was an incumbent of a parish was transferred to another ecclesiastical parish in Wales, he was under an obligation by virtue of these resolutions to hand over to the body any existing interest he had, whether commuted or not, and whatever such interest consisted of. In such cases the amount of his existing interest, whatever it was, whether greater or less than the stipend of the place to which he was moved, was paid him by the representative body and the governing body. The plaintiff, it is submitted, knew of this practice and had agreed to it by signing a

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declaration agreeing to be bound by all rules and regulations of the governing body and by the canons of the Church in Wales. Further the plaintiff had agreed when he was inducted as vicar of Penmark to being bound by the rules at the time of his induction, the agreement being made on behalf of the representative body. An inference could be made that the plaintiff must be taken to know what he would get on his transfer to Penmark. The Act of 1914, s. 14, clearly lays down that on a person who holds an ecclesiastical office affected by the Act by freehold tenure being moved to another parish (as in the plaintiff's case), he must pay over the net income of the ecclesiastical office held by him to the representative body (see the proviso to sub-s. 1). So long as he continued in his original office he was entitled to retain the benefit, but after transfer to another office he must pay over the annuity to the defendant body. Sect. 18, which was relied on by the plaintiff, only dealt with what might be called secularized property, while the other sections 14 and 15 dealt with all property, secular or ecclesiastical. It therefore was not an alternative to those sections but a separate and independent section. The governing body of the Church in Wales could cut down a vested interest laid down by the Act, if it was in the interests of the Church.

Hon. Sir Stafford Cripps K.C. in reply. It is not right for the representative body to put forward as regulations what were merely resolutions which had been incorporated in a report and adopted by the governing body. The plaintiff's rights are governed by s. 18 of the Act of 1914. Resolutions passed by the representative body cannot possibly cancel or affect a section of an Act of Parliament. The plaintiff is entitled to his full annuity.

Cur. adv. vult.

Jan. 18. LUXMOORE J. [having stated the facts as set out above, continued:] The solution of the questions which arise depends chiefly on what is the proper construction of the Welsh Church Act, 1914, as amended by the Welsh

Church (Temporalities) Act, 1919, but questions of fact also arise for consideration.

The Welsh Church Act, 1914, provided for the disestablishment of the Church of England in Wales and Monmouthshire, called in the Act the Church in Wales, and for the vesting and distribution of its property. The Act provided a date for the disestablishment. This date was postponed and by subsequent legislation—namely, the Welsh Church (Temporalities) Act, 1919, s. 2—March 31, 1920, was ultimately fixed as the date of disestablishment. On that date, every cathedral and ecclesiastical corporation in the Church in Wales, whether sole or aggregate, was dissolved: see s. 2 of the Act of 1914. Sect. 3 provides that as from [March 31, 1920] the ecclesiastical law of the Church in Wales should cease to exist, and that from that date the then existing articles, doctrines, rites, rules, discipline and ordinances of the Church of England should, with and subject to such modification or alteration, if any, as after the passing of the Act might be duly made therein, according to the constitution and regulations for the time being of the Church in Wales, be binding on the members for the time being of the Church in Wales in the same manner as if they had mutually agreed to be so bound, and should be enforceable in the temporal Courts in relation to any property which by virtue of the Act is held on behalf of the Church in Wales or any members thereof, in the same manner and to the same extent as if such property had been expressly assured upon trust to be held on behalf of persons who should be so bound. Sect. 4 provides that as from [March 31, 1920] all property specified in that section, which includes property belonging to or appropriated to the use of any ecclesiastical office in the Church in Wales or the holder of any such office as such, should vest in a body constituted under the Act under the title of the Welsh Commissioners. Sect. 8 directs the Welsh Commissioners to transfer in the manner therein mentioned the property vested in them by the Act. The property to be transferred is divided into two classes—namely, property which is to remain ecclesiastical and that which was to be secularized. The

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latter class includes tithe rentcharge (defined in s. 38 of the Act as including "all payments in lieu of or in the nature of tithes or tithe rentcharge") which was before the date of disestablishment appropriated to the use of any parochial benefice of the Church in Wales, but does not include any tithe rentcharge or property of a like nature given for ecclesiastical purposes by way of private benefaction as defined in s. 7 of the Act. By s. 8, sub-s. 1 (c), it is directed that the tithe rentcharge is to be transferred to the appropriate county councils specified in that sub-section. Sub-s. 2 of s. 8 directs that: "save as otherwise provided by this Act, all property transferred under this section shall be held subject to all existing public and private rights with respect thereto, and all tenancies, charges, and incumbrances which may at the date of transfer be subsisting therein, and in the case of all such property, except tithe rentcharge transferred to a county council, to the existing interests of all persons who at the passing of this Act (September 18, 1914), hold ecclesiastical offices in the Church in Wales, and in the case of such tithe rentcharge," subject to the obligation to make the provision required by the Act in lieu of such existing interests therein.

Sect. 13 provides for the constitution of a representative body of the Church in Wales and confers on it power to frame constitutions and regulations for the general management and good government of the Church in Wales and the property and affairs thereof whether as a whole or according to dioceses. It is under this section that the defendant body was incorporated by Charter on April 15, 1919. Sect. 14 provides, by sub-s. 1, that any person who [on September 18, 1914] held an ecclesiastical office by freehold—as was the case of the plaintiff in respect of the rectory of Coity with Nolton Chapel—shall retain his existing interest in the emoluments of that office so long as he holds that office or any other ecclesiastical office in the Church in Wales to which he may be nominated or appointed after [September 18, 1914], whether before or after [March 31, 1920]. By sub-s. 2 such an existing interest is to determine after the expiration of six months from the

date when the holder ceases to hold any ecclesiastical office in the Church in Wales. Pausing here, it seems plain that under this provision the plaintiff retained his interest in the emoluments of Coity with Nolton Chapel so long as he remained rector of that parish, and that he will continue to retain that interest so long as he holds any other ecclesiastical office in the Church in Wales—such for example as the office of vicar of Penmark—and for six months after he ceases to hold that office. Sub-s. 1, however, contains a proviso to the effect that when a person who held such an office as the rectory of Coity on September 18, 1914, is subsequently appointed to another ecclesiastical office in the Church in Wales, he must “except as otherwise expressly provided by the Act” pay over the net income of the ecclesiastical office held by him at the passing of the Act to the representative body.

It is to be observed that what is to be paid to the representative body under the proviso is not the emoluments of the office held at the passing of the Act but the net income of that office, and that net income is defined by sub-s. 4 as having the same meaning as the expression “annual value of a benefice” has in the Incumbents Resignation Act, 1871. There is no express mention of tithe rentcharge in this section, but there can be no doubt that tithe rentcharge is included in the phrase used in the section, “emoluments of office.” Sect. 15 contains provisions as to tithe rentcharge. It directs that an annual sum to be ascertained in the manner stated in the section shall be paid to each person who had any “existing interest” in any tithe rentcharge transferred to a county council under the Act “in substitution for and in satisfaction of that interest, and so long as that interest would otherwise have continued”—namely, so long as the person holds any ecclesiastical office in the Church in Wales and for six months afterwards. The payment is not to be made directly to the person mentioned but is to be paid by the appropriate county council to the representative body “upon trust to pay over the same to the person who had such an existing interest as aforesaid,” and the amount so

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LUXMOORE payable is charged on the county fund. The county council and the representative body are to be deemed to be the owner of the tithe rentcharge attached to a benefice for the purposes of the Tithe Rentcharge Rates Act, 1899, so long as the holder of the benefice continues to be entitled to the amount payable in respect of such tithe rentcharge under s. 15 but no longer. There is an express provision that the holder of any ecclesiastical office in the Church in Wales, so long as the amount payable to him under s. 15 is paid, is not to be relieved of any liability to repair any ecclesiastical building to which as owner of tithe rentcharge he was subject immediately before [September 18, 1914].

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It is difficult to understand the precise effect of this section with reference to the proviso to sub-s. 1 of s. 14, for, although no doubt any annual sum payable under the provisions of s. 15 is to be ascertained with regard to the tithe rentcharge included in the emoluments of the ecclesiastical office held on September 18, 1914, s. 15 does not provide that the annual amount payable under it to any person having an existing interest in tithe rentcharge shall be deemed to be an emolument of the ecclesiastical office held by him on September 18, 1914, or that it shall be taken into account in ascertaining the net income of such office for the purposes of the proviso. Moreover the express provision that the county council is to pay each annual sum payable under s. 15 to the representative body "upon trust to pay over the same" to the person entitled to the existing interest, is difficult to reconcile with the direction contained in the proviso in the case where there has been a change of ecclesiastical office after September 18, 1914. It is however not necessary for me to attempt to solve these difficulties, for the annuity in question does not arise under this section but under s. 18.

Sect. 18 provides a scheme for the commutation of the existing interests of the holders of all ecclesiastical offices in the Church in Wales in what I have referred to as the property to be secularized, including tithe rentcharge. These existing interests were preserved by s. 14 of the Welsh Church Act, 1914. Under s. 18, the scheme for commutation was

optional and its applicability depended on the volition of the representative body. This option was in effect taken away by the Welsh Church (Temporalities) Act, 1919; for s. 3 of that Act provides that s. 18 of the Welsh Church Act, 1914, shall have effect as if the representative body had exercised the option. Sect. 18, having regard to the provisions of the Welsh Church (Temporalities) Act, 1919, provides (so far as is material to the present case) by sub-cl. (a) that as from the date of disestablishment [March 31, 1920] the existing interests of the holders of all ecclesiastical offices in the Church in Wales in all property vested in the Welsh Commissioners and by them to be transferred to the county councils (namely, the tithe rentcharge appropriated to parochial benefices) shall determine, and the provisions of the Act respecting existing interests in such property, and the payment of money in substitution for and in satisfaction of such interests, shall cease to have effect. Under this provision the plaintiff as rector of Coity with Nolton Chapel ceased, as from March 31, 1920, to have any interest in the tithe rentcharge appropriated to that rectory, and the provisions of ss. 14 and 15 cease to have any effect with regard to his existing interest. For it is plain that s. 14 contains provisions in respect of existing interests in property which includes the tithe rentcharge appropriated to the rectory of Coity with Nolton Chapel at the date of disestablishment, and that s. 15 provides for the payment of money in substitution for and in satisfaction of those interests.

It follows, in my judgment, that as from the date of disestablishment, namely, March 31, 1920, the plaintiff's rights (if any) in respect of the tithe rentcharges appropriated to the rectory of Coity must be sought under the scheme for commutation contained in s. 18. By s. 18, sub-cl. (b), the Welsh Commissioners are directed to pay to the representative body the aggregate value of the existing interests of holders of ecclesiastical offices in the Church in Wales in tithe rentcharge and the other property to be secularized. This is a capital sum to be ascertained as provided in the Fourth Schedule to the Act and is to bear interest from March 31,

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1920, until payment. Sub-cl. (e) provides that the holder of any ecclesiastical office in the Church in Wales, as defined in the sub-section—the plaintiff is clearly within this definition—“shall, subject to any arrangements which may be made between him and the representative body, be entitled in lieu of his existing interest in such property as aforesaid” —I read the clause with reference to the question to be determined—[that is the tithe rentcharge appropriated on September 18, 1914, to the parochial benefice of Coity with Nolton Chapel] “to an annuity calculated in manner provided by the Fifth Schedule to this Act”—namely, an annuity of 52*l.* 13*s.* 6*d.*—“so long as he continues to hold an ecclesiastical office in the Church in Wales, ...”

The words are plain. Under the section the plaintiff is entitled to an annuity of 52*l.* 13*s.* 6*d.* so long as he holds an ecclesiastical office in the Church in Wales, and the only limitation on his right is such arrangement (if any) as may have been made between him and the representative body. If no such arrangement was in fact made, then his right would appear to be absolute. No part of ss. 14 or 15 can apply to this annuity, for such provisions as are contained in those sections respecting the plaintiff's existing interests in the tithe rentcharge appropriated to the rectory of Coity and the payment to him by the appropriate county council through the representative body of the annual sum provided by s. 15, are expressly excluded from operating.

It appears to me that on the true construction of the Welsh Church Act, 1914, as amended by the Welsh Church (Temporalities) Act, 1919, the provisions of s. 18 of the former Act are a separate code fixing the rights and interests of persons entitled to existing interests on September 18, 1914, in the particular event of the commutation of the whole of those existing interests. Sub-cl. (f) provides that every annuity payable under s. 18 shall be charged on the property for the time being vested in the representative body, and shall be treated as part of the emoluments of the ecclesiastical office which the annuitant held at the passing of the Act.

In my judgment, this sub-clause has no substantial bearing on the question I have to determine. It cannot I think be construed as operating to keep in force any of the provisions of s. 14; for s. 18, sub-cl. 1, expressly negatives the continued operation of any part of s. 14. This view is strengthened by the presence in sub-cl. (e) of s. 18 of the words, "subject to any arrangements which may be made between him" [the holder of the ecclesiastical office] "and the representative body." For if the proviso to s. 14 is applicable to an annuity under s. 18, the words in sub-cl. (e) to which I have referred are without any sensible meaning: while the provisions in sub-cl. (f) of s. 18 that an annuity under that section is to be treated as part of the emoluments of the ecclesiastical office are necessary, on the footing that s. 18 affords a distinct code with regard to secularized property, in order to preserve the rights of incumbrancers as against the particular annuitant. For similar reasons, sub-cl. (g) of s. 18 is necessary to preserve the annuitant's liability for the repairs he would have been liable to execute if he had retained his interest in the tithe rentcharge.

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My attention has been called to s. 21, which relates to vacancies occurring in any ecclesiastical office in the Church in Wales during the period between September 18, 1914, and March 31, 1920. In my judgment, no assistance with regard to the construction of s. 18 is to be obtained from this section.

I therefore hold that on the true construction of the Act, and apart from any question whether there was an arrangement between the plaintiff and the representative body within the meaning of s. 18, sub-cl. (e), affecting the plaintiff's right to the annuity under the section, and apart also from any question whether there are any constitutions or regulations affecting the plaintiff's right, the plaintiff is entitled under s. 18 of the Act to the annuity of 52*l.* 13*s.* 6*d.* so long as he holds an ecclesiastical office in the Church in Wales.

It remains to be considered, first, whether there was any such arrangement as that to which I have referred, and if there was no such arrangement, whether there is any constitution or regulation affecting the plaintiff's right.

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The plaintiff was instituted and inducted to the vicarage of Penmark in July, 1933. Before he accepted the preferment, there were conversations between the plaintiff and a Mr. Morgan, the then secretary of the representative body. Unfortunately Mr. Morgan is dead. The plaintiff has given no evidence as to what transpired between himself and Mr. Morgan. Mr. Simonds on behalf of the representative body has asked me to infer that there was an arrangement under which the plaintiff agreed to accept the vicarage of Penmark on the footing that he would be entitled to receive the annuity of 52*l.* 13*s.* 6*d.*, but would bring into account against it the income of Dr. Neale's bequest. I am asked to infer this from (a) the fact that the practice adopted by the Church in Wales with regard to a person who held an ecclesiastical office on September 18, 1914, and was subsequent to March 31, 1920, transferred to another ecclesiastical office in the Church in Wales, was to allow to such person in respect of the new office a stipend equal to the amount of his existing interest on September 18, 1914, or the stipend assigned to his new office, including the income derived from any trust fund existing before March 31, 1920, attached to that office, whichever should be the greater; and (b) the correspondence passing between the plaintiff on the one hand and Mr. Morgan on the other before the plaintiff was instituted and inducted to the vicarage of Penmark, and the correspondence between the same persons in September, 1933, and on January 2, 1934, and also between the plaintiff's solicitors and Mr. Morgan subsequent to the last mentioned date. It is admitted that Mr. Morgan had no power to make any arrangement without the authority of the representative body, and it was not suggested that any such authority was conferred on Mr. Morgan. In the circumstances I do not think I should be justified in drawing any such inference as the defendants asked me to do.

It was said that rules and regulations were made by the representative body under the authority or with the consent of the governing body of the Church in Wales, and that those rules and regulations which were in force on July 3,

1934, when the plaintiff was instituted and inducted to the vicarage of Penmark, provided that the income of trust funds held in trust for a living before March 31, 1920, should be deemed to form part of the stipend of the living and that an incumbent entitled to an annuity under s. 18 of the Welsh Church Act, 1914, upon taking up a new ecclesiastical office in the Church in Wales, should be entitled to receive by way of stipend either the annuity or the actual stipend attached to the new office, whichever should be the greater ; and that the plaintiff, by the declaration made by him upon his institution and induction to the vicarage of Penmark, consented to be bound by and to submit to all the canons of the Church in Wales and all the rules and regulations which had theretofore been made or which might from time to time be made by or under the authority or with the consent of the governing body of the Church in Wales.

The constitution of the Church in Wales is contained in twelve chapters. A copy of this constitution, as amended in 1930, 1931 and 1932, is set out on pp. 297 to 400 of the official handbook of the Church in Wales for the year 1933. It is admitted that no such rule or regulation as is relied upon by the representative body is to be found in the constitution, but it is said that such a rule or regulation was made on July 31, 1924. A copy of the resolution of this date is to be found on p. 6 of the agreed bundle of correspondence. It is in these terms : " That while the representative body accept the opinion of counsel . . . on the question of vested interests, it is prepared to bind itself to continue the existing practice in regard to the stipends payable to incumbents, with vested interests, who move to other benefices, and it requests the drafting committee to submit to the next meeting of the representative body a form of words which will make effective this decision."

It is not suggested that there was any subsequent consideration of any form of words or draft as is referred to in this resolution. Having regard to the form of the resolution, I think it is plain that no such rule or regulation as is relied on by the representative body ever existed. It is

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LUXMOORE J. unnecessary therefore to consider the question whether, if such a rule or regulation existed, it was ultra vires the representative body or the governing body.

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In the result, I hold that the plaintiff is entitled to the declaration he seeks, and I accordingly make a declaration in accordance with para. 1 of the prayer to the statement of claim. I should mention that in addition to the income from Dr. Neale's trust, there is an assigned stipend of 50*l.* a year in favour of the vicarage of Penmark. I understand that whether he has a legal right to this assigned stipend or not, no claim is made to it; and consequently it is not to be mentioned in the declaration which I now make.

Solicitors: *Gibson & Weldon, for Northcott Howell & Co., Cardiff; Deacon & Co., for Barker, Morris & Owen, Carmarthen.*

A. R. T.

CAHILL v. LONDON CO-OPERATIVE SOCIETY,
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[1935. C. 528.]

Industrial and Provident Society—Co-operative Society—Registered Rules—Education and Political Fund—Allocation of percentage of net profits for political purposes—Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 12, sub-s. 7—Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 10, sub-s. 6.

Where a co-operative society registered under the Industrial and Provident Societies Act, 1893, is by its rules authorized to constitute and allocate a certain percentage of its net profits to an education and political fund, the application of these net profits for political purposes is not ultra vires the society and is lawful under the Industrial and Provident Societies Act, 1893, s. 10, sub-s. 6, which provides that: "The rules of every society registered under this Act shall provide for the profits being appropriated to any purposes stated therein or determined in such manner as the rules direct."

The remarks of Lord Ormisdale in *Lafferty v. Barrhead Co-operative Society, Ltd.*, (1919) 1 Sc. L. T. 257, 259, considered and applied.

WITNESS ACTION.

The plaintiff, who was a member of the defendant society, the London Co-operative Society, Ltd., sued the society on his own behalf and on behalf of his fellow members for a declaration that the society was not entitled to allocate any part of the profits earned in the carrying on of its business to a political fund for the purpose, among other things, of organizing or disseminating political propaganda or conducting electioneering campaigns, either in connection with Parliamentary or municipal elections. The plaintiff claimed a declaration that such an allocation was ultra vires the society.

The society admitted that since its registration moneys had been allocated out of the net profits earned by the society to an education and a political fund of the society, and that one-half of the moneys so allocated, the totality being 5 per cent. of the society's net profits, had been applied for political activities.

The society was registered in the year 1920 under the

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Industrial and Provident Societies Act, 1893. It had a membership of 530,610 persons, and its share capital amounted on September 1, 1934, to 6,790,509*l.* odd. It was agreed that the relevant rules were those contained in the copy of the amended rules registered on November 17, 1934, which provided as follows:—Rule 2: “The objects of the society shall be: (1.) to carry on the business of a storekeeper, general dealer, and universal provider in all its branches, and in particular to buy, sell, manufacture, produce, grow, cultivate, and deal in goods, stores, consumable articles, chattels and effects of all kinds, both wholesale and retail, and generally to engage in any business, trade, or industry, which may seem to the society directly or indirectly conducive to the interests or convenience of the society’s members or any section thereof; (2.) the business of builders, dealers of any description with land, including estate development and estate management, and the business of insurance against risks of any description connected with the property and to transact every kind of agency business (including insurance and banking agency); (3.) in all ways to further the establishment of the Co-operative Commonwealth.” The same rule empowered the society to establish a pension or superannuation fund for its employees, and conferred on the society full power to do all things necessary or expedient for the accomplishment of all the objects specified in its rules. Rule 29 provided: “The profits of all business carried on by or on account of the society shall be applied as follows,” and then followed provisions as to the expenses of management, depreciation, payment of interest on shares, and the formation of a reserve fund, and in sub-clause 5 there was a direction “that 5 per cent. of the net profits shall be allocated to an Education and a Political Fund.” Rule 30 provided: “An Education and Political Fund shall be formed by allocating 5 per cent. of the net profits, and such fund shall be administered by a Committee consisting of 32 members (two of whom shall be appointed by and from the Committee of Management), twelve elected to represent the Eastern area, ten elected to represent the Northern area, and eight elected to represent the Western

area, which shall be designated the Education and Political Committee. This Committee shall be divided into two sections of equal numbers one an Education Section and the other a Political Section. Members of this Committee shall be elected in April and October subject to candidates being nominated as provided for in Rules 16 (Clauses (b), (c), (d), (e) and (f)) and 17. Rules 20 and 21 shall also apply to the Education and Political Committee. Each of the sections (Education and Political) shall be separately elected. The term of office of each Committeeman shall be for a period of two years. The Committee shall divide the amounts allocated to the fund, viz., 5 per cent. of the net profits, into two equal parts and allocate one part to each, the Education and Political Sections respectively, for their purposes. Each section, the Education and Political, shall have power to appoint and remove a secretary and such staff as shall be necessary and shall determine their duties and remuneration." There were also provisions with regard to the meetings of those committees.

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Plaintiff in person. The application by the defendant society of any part of their funds or the income of those funds is not within their powers under the Industrial and Provident Societies Act, 1893, under which Act the rules of the defendant society are registered. Such an application of their funds is wholly void and ultra vires. It is also illegal and contrary to public policy.

[LUXMOORE J. The question seems to be, Can a society who by its rules (rule 29, sub-clause 5) is entitled to spend part of its funds on political activities legally do so, either as the result of a statute or some decision?]

The application of these funds by the defendant society is not within the "orbit" of the Industrial and Provident Societies Acts. To apply them in the interests of any one political party would be clearly not acting in the best interest of the various co-operative business concerns. Up to 1917 the whole movement regarding co-operative business concerns was against the application brought about by the defendant

LUXMOORE society. Provident purposes—namely “thrift”—was the dominant idea, not political propaganda. [He referred to *Amalgamated Society of Railway Servants v. Osborne*. (1)]

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R. F. Roxburgh K.C., H. O. Danckwerts and R. Knight for the defendants. The question is one of the application of the profits arising from the carrying on by the defendants of their various concerns. Rule 29, sub-clause 5, is relied on. No case is directly in point, but see the dicta of Lord Herschell and Lindley L.J. in a case under the Act of 1876, *Warburton v. Huddersfield Industrial Society* (2), on the words “any lawful purpose.” Assistance is also to be found in a Scotch case, where s. 10, sub-s. 6, of the Act of 1893 (which, it is submitted, applies here) was referred to—namely, *Lafferty v. Barrhead Co-operative Society, Ltd.* (3), and in which the remarks of Lord Ormidale, though only “obiter,” are strongly relied on. Compare also *Hampton v. Toxteth Co-operative Provident Society, Ltd.* (4); *Cotter v. National Union of Seamen*. (5) See also Halsbury on the Laws of England (2nd ed.), vol. 17, p. 484; Fuller on the Law of Friendly Societies (4th ed.), p. 386.

The Act of 1893, together with these rules, renders the action of the defendants in allocating part of their profits for political purposes justifiable. [*Amalgamated Society of Railway Servants v. Osborne* (1) was referred to.] The Trade Union Act, 1913, now of course legalizes the application of a trade union’s funds for political objects.

Plaintiff in reply.

LUXMOORE J. [after stating the facts, continued:] There can be no doubt that the rules to which I have referred authorize in express terms the constitution of a political fund out of the society’s profits and are sufficient to justify the society’s actions unless the particular rules are ultra vires the society. The rules are, as I have already said, registered

(1) [1910] A. C. 87.

(3) (1919) 1 Sc. L. T. 257, 259.

(2) [1892] 1 Q. B. 817, 819, 821.

(4) [1915] 1 Ch. 721, 734.

(5) [1929] 2 Ch. 58, 105, 106.

under the Industrial and Provident Societies Act, 1893, and it is necessary to consider the material provisions of that Act in order to come to a conclusion whether the rules are ultra vires or not. The Act is described as an Act to consolidate and amend the laws relating to Industrial and Provident Societies. It took the place of the Industrial and Provident Societies Act of 1876, which it repealed. The last mentioned Act provided by s. 6 : "The societies which may be registered under this Act are societies (herein called industrial and provident societies) for carrying on any labour, trade, or handicraft, whether wholesale or retail, including the buying and selling of land," and by s. 7, sub-s. 1, it provided : "No society can be registered under this Act which does not consist of seven persons at least. (2.) For the purpose of registry an application to register the society, signed by seven members and the secretary, and two written or printed copies of the rules, shall be sent to the registrar." Sect. 9 provided : "With respect to the rules of societies the following provisions shall have effect : (1.) The rules of every society sent for registry shall contain provisions in respect of the several matters mentioned in the Second Schedule to this Act." The Second Schedule to the Act provided by cl. 1 that the object, name and place of office of the society should be stated : and by cl. 10 that the mode of application of the profits should be defined. Sect. 12 of the Act provided that : "With respect to the property and funds of registered societies, the following provisions shall have effect." I need not refer to the first six sub-sections of that section, but sub-s. 7 is material : "The profits of the society may be applied to any lawful purpose."

A question arose under this Act with regard to s. 12, sub-s. 7, which ultimately came before the Court of Appeal in the case of *Warburton v. Huddersfield Industrial Society*. (1) The defendant in that case was an industrial society registered under the Act of 1876. By its rules the objects of the society were declared to be to carry on certain trades and businesses, and by rule 10 it was provided

(1) [1892] 1 Q. B. 817.

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that: "The net profits of all business carried on by the society, after paying or providing for the expenses of management, interest on loans, the proper reduction in the value of fixed stock, and for such interest upon the subscribed capital thereof as aforesaid, shall from time to time be applied by direction of the ordinary quarterly meeting, either to increase the capital, reserve fund, or business of the society, or to any lawful purpose; and the remainder, less any grant that may be made for educational purposes, at any general meeting, shall be divided among the members in proportion to the amounts of their purchases at the stores during the half year. . . . " The society, at a properly constituted meeting, passed a resolution that a contribution out of the society's profits should be made to a strike fund for the support of a strike of workmen in the Huddersfield district. The question as to the validity of that contribution was decided on the true construction of rule 10, to which I have just referred, and the Court held that the words "any lawful purpose" were restricted to some purpose of the society ejusdem generis with the purposes enumerated in the preceding part of the rule. It was pointed out by each member of the Court of Appeal that different considerations might have applied if the rules had been in different form. Lord Herschell, after calling attention to the words of s. 12, sub-s. 7, of the Act of 1876—"the profits of the society may be applied to any lawful purpose"—said this (1): "All I will say is this, that it may be that under s. 12 of the Act, taken by itself, it would be open to an industrial society to provide by its rules that the majority at the meeting might apply a portion of the profits to any object that was not an illegal one. I do not go beyond that, and for this reason, that in the view which I take the question does not arise for decision here." Lindley L.J. also called attention to s. 12, sub-s. 7, and said this (2): "I cannot myself avoid coming to the conclusion that 'any lawful purpose' in sub-s. 7 means any lawful purpose which is consistent with the rules. It cannot mean anything inconsistent with the rules. The rules are to provide the mode

(1) [1892] 1 Q. B. 819.

(2) Ibid. 821.

of applying the profits. I do not think it would be possible to say, for example, that if the rules prescribed a particular mode of applying the profits, any one could bring in sub-s. 7 and say: 'The profits of the society may be applied to any lawful purpose; therefore we will disregard the rules.'"

Kay L.J. reserved his opinion as to the meaning of s. 12, sub-s. 7. The case appears to have been decided on the meaning of the rules of the particular society as they existed at the time the action was brought.

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The case of *Warburton v. Huddersfield Industrial Society* (1) was decided on March 10, 1892, and on September 12, 1893, the Industrial and Provident Societies Act, 1893, was passed. As I said, it is an Act to consolidate and amend the laws relating to industrial and provident societies. Sect. 4 provides: "A society which may be registered under this Act (herein called an industrial and provident society) is a society for carrying on any industries, businesses, or trades specified in or authorised by its rules, whether wholesale or retail, and including dealings of any description with land." Sect. 5 deals with the conditions of registration and provides for the registration of rules by the registrar. Sect. 10 provides, by sub-s. 1: "The rules of a society registered under this Act shall contain provisions in respect of the several matters mentioned in the Second Schedule to this Act." The Second Schedule to the Act is for all practical purposes similar to the Second Schedule to the Act of 1876 in that it includes as one of the matters to be provided for by the rules the mode of application of the profits. The material sub-section in this case is sub-s. 6 of s. 10, and that sub-section provides: "The rules of every society registered under this Act shall provide for the profits being appropriated to any purposes stated therein"—that must mean in the rules—"or determined in such manner as the rules direct." This sub-section takes the place of sub-s. 7 of s. 12 of the Act of 1876. It is to be observed that it is mandatory in form; it is no longer "the profits of the society may be applied to any lawful purpose," but "the rules of every society registered under this

LUXMOORE J. Act shall provide for the profits being appropriated to any purposes stated therein. . . .” The words “any purposes” are very wide ; there is no restriction on them in express terms.

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In my judgment I am not entitled to limit them by restricting them to any purposes connected with the society's objects ; the only limitation I can find is that the purposes must be either stated in the rules or determined in such manner as the rules direct. The alteration appears to me to have been made with regard to the decision in the case of *Warburton v. Huddersfield Industrial Society* (1), because it meets the criticism directed to the words of sub-s. 7 of s. 12 of the Act of 1876 to be found in the judgments in that case.

In those circumstances and having regard to the precise form of sub-clause 5 of rule 29, and of rule 30, I have no hesitation in holding that the allocation of one-half of 5 per cent. of the profits of the society to the political fund and the devotion of that fund to the political activities described are valid objects and are neither of them ultra vires the society.

I am fortified in the view I have expressed by the decision of Lord Ormisdale in a case which came before the Scotch Courts in 1919 ; the case I refer to is *Lafferty v. Barrhead Co-operative Society, Ltd.* (2) In that case the question was whether the Barrhead Co-operative Society, Ltd., was empowered by its rules and by the Act of 1893 to apply part of these profits in promoting the return of co-operative candidates to Parliament and local government bodies. Lord Ormisdale said this : “That question truly is whether s. 10 (6.)”—that is of the Act of 1893—“gives the members of a society registered under the Act of 1893 power to vote a portion of its profits to the furtherance of political ends. In my opinion it does. Its terms appear to me to be such as to authorise the society to apply its profits to any purpose (which is not illegal) specified in or directed by its rules. Sect. 10 (1.) and Sch. II. have already enacted that the rules must provide for the mode of application of the profits. Sect. 10 (6.) goes a stage further and declares the purposes to which they are to be appropriated. The only limitation is

(1) [1892] 1 Q. B. 817.

(2) (1919) 1 Sc. L. T. 257, 259.

that the purposes must be stated in the rules or 'determined in such manner as the rules direct.' This limitation, and no other, is expressed. Such being the case, there is no room, or indeed right, to imply any further limitation from the remaining provisions of the statute, such as that the purpose must be, as it was phrased in argument, ancillary to the trade or business, the carrying on of which gave the society the right to be registered. There was no section in the Trade Union Act which was under consideration in *Osborne's* case (1), corresponding to s. 10 (6.) of the Act of 1893." Lord Ormidale having said that went on to consider the rule relied upon in that case, and held that as a matter of construction of that rule, the rule was not wide enough to authorize expenditure for the particular political purposes desired, and he accordingly granted an injunction restricting the application of the moneys for the purposes in question. But it is plain from his judgment that if the rules had been formulated differently and had expressly provided for expenditure of part of the profits for political purposes, his decision would have been the other way, and he would have held that such a rule was a valid and proper rule and was not ultra vires the society.

In the present case the rules are so drawn as to leave no doubt in the mind of the reader that half of the 5 per cent. of the society's profits is to be paid over to a political fund and dealt with for political purposes.

Mr. Roxburgh and Mr. Danckwerts, on behalf of the defendant society, raised certain further questions with regard to the validity of the rules on the footing that I might take a different view of the construction of s. 10, sub-s. 6, of the Act of 1893. In my view those questions do not arise for decision having regard to the view which I have expressed as to the proper construction to be placed on this sub-section; I think it would be unwise to say anything further about those points, and I refrain from doing so. The action will be dismissed with costs.

Solicitor for the defendants: *T. U. Liddle*.

(1) [1910] A. C. 87.

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In re ROBERTS' WILL TRUSTS.

1937
Jan. 22.

YOUNGER *v.* LEWINS.

Trust—Will—Bank made trustee and executor—Income and withdrawal fees—Separate trust funds—Incidence of fees as between separate funds and residue.

A testatrix appointed a bank as one of her executors and trustees and declared that the bank should be entitled to remuneration "in accordance with the bank's scale of fees now in force." The will created certain trust funds to be held on separate trusts. It was admitted that the acceptance fee charged by the bank was payable out of residue. Questions arose whether the income fees and withdrawal fees were payable out of the income and capital of the separate funds or out of residue:—

Held, that the income and capital fees were payable out of the income and capital of the separate funds.

In re Hulton [1936] Ch. 536 and *In re Riddell* [1936] Ch. 747 distinguished.

ELIZABETH ROBERTS, widow, made her will dated May 4, 1934, and thereby appointed her nephew, Arthur Younger, and the Westminster Bank, to be the executors and trustees thereof and declared that the Bank should be entitled to remuneration, in addition to the customary share of brokerage, "in accordance with the Bank's scale of fees now in force," free from duties.

The testatrix gave and bequeathed certain legacies, free of all duties, to various charitable bodies and institutions to the amount of 4500*l.* and also a number of personal legacies to the amount of more than 12,000*l.*, all free of duty.

The testatrix directed her trustees to invest the sum of 1500*l.* and to hold the same upon trust to pay the income thereof to her niece May Laurence during her life and after her death upon certain trusts. She also directed her trustees to invest three other sums of 1500*l.*, 1000*l.*, and 4000*l.* respectively and to pay the respective incomes to certain persons for their respective lives, and after their deaths to hold the same upon certain trusts.

The testatrix gave devised and bequeathed her residuary real and personal estate upon trust to sell call in and convert

the same and to pay her funeral and testamentary expenses and her debts and the legacies and investments therein-before given and directed and to pay to four named persons the sum of 300*l.* each and to divide the residue of her estate equally between six named persons or such of them as should survive her.

The testatrix died on January 9, 1936, and her will was proved on March 25, 1936. Her estate was valued for probate at 41,950*l.* 8*s.* 9*d.* All debts funeral and testamentary expenses and the duties payable on her death had been paid.

The Westminster Bank issue a booklet giving information as to the terms on which they accept and carry out the office of trustee of wills or settlements. They have three sets of fees ; an acceptance fee, which is payable upon taking up the office and charged upon the gross value of the estate ; a withdrawal fee, which is payable on the capital value of any property withdrawn from the trust, whether upon distribution among the beneficiaries or otherwise ; and an income fee, which is charged upon the actual income received at certain specified rates.

The booklet states that in the absence of any special provision in a will or settlement the income fee in respect of an annuity or settled legacy or fund is charged to the annuitant or beneficiary.

The persons entitled to residue claimed that such fees should all be paid out of the capital and income of the settled funds respectively. The executors issued this summons to decide certain questions arising on the will and (inter alia) whether the income fees payable on the income of the settled funds and the withdrawal fees were payable out of the income and capital respectively of the respective funds or out of residue, it being admitted that the acceptance fees were payable out of residue.

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Wilfrid Hunt appeared for the plaintiffs.

E. M. Winterbotham for the residuary legatees.

G. P. Slade, P. H. L. Brough, Gerald Upjohn and *Herbert Hart* for the other defendants.

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CROSSMAN J. stated the question raised on this point in the summons and continued: The testatrix by her will appointed Westminster Bank Limited one of her executors and trustees, and made the following declaration: "I declare that the Bank shall be entitled to remuneration, in addition to the customary share of brokerage, in accordance with the Bank's scale of fees now in force, free of duties." Then she bequeathed by paras. 6, 7, 8 and 9 of her will, or rather I should say that she directed her trustees to invest, four sums of money, capital sums, which were to be held on trust to pay the income to tenants for life, and after their deaths on trust for persons therein named. Then she gave her residue on the usual trusts for conversion, and to pay her debts and legacies, to pay certain sums out of the residue in the first instance, and to divide the ultimate residue between certain relatives.

Westminster Bank Limited has issued, and had in force at the date of the will, a brochure entitled "Wills Trusts and Settlements. The Westminster Bank as Executor or Trustee." It contains the terms and conditions on which the Bank will accept the office of executor or trustee of wills. To find out what was meant by the declaration in the will that the Bank shall be entitled to "remuneration, in addition to the customary share of brokerage, in accordance with the Bank's scale of fees now in force," I have to look at this document, and I find that the Bank, when acting as trustee or executor, charges three kinds of fees. The first is the "acceptance fee," which is a capital fee charged when it takes over the trust. The second is the "income fee," which is charged on the income actually received while the trust is continuing. The third is a "withdrawal fee," which is a capital fee charged when the trust comes to an end, and the trust fund is distributed. Originally a question was raised as to the acceptance fee, but the question raised by the summons as amended relates only to the income fee and the withdrawal fee. It has been contended on behalf of the persons interested in the capital and income of one or more of the settled legacies that the result of the declaration in

the will as to the Bank's remuneration is that the income fee ought to be paid out of the income of the residuary estate, and that the withdrawal fee on the distribution of the settled funds ought also to be paid out of the residuary estate, the main argument in support of that contention being that, as the Westminster Bank is a legatee of this remuneration, the remuneration ought to be paid like an ordinary legacy out of residue.

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The cases which have been referred to do not, in my view, affect this case, because both Clauson J.'s decision in *In re Hulton* (1) and Farwell J.'s decision in *In re Riddell* (2) relate to an annuity, and it seems to me that there is all the difference in the world between the trust to pay the annuity or the gift to the annuitant in those cases and the trust or direction in this case to set aside capital sums and deal with the income and capital of those sums. Where there is a gift of an annuity the annuity is payable in the first instance clear, and the residue out of which the annuity is to be paid bears any charges which come after the annuity. The annuity must be paid first, and Clauson J. lays stress on this in his judgment in *In re Hulton* (1), where he says: "In my view, on this will—and the same observation would apply to any will in which there is an annuity charged on the fund—it is perfectly clear that the persons who are interested in the income, other than the annuitant, are to have nothing until the annuity is paid in full."

The present case is quite different from that of an annuity. There is no question here of a residuary donee of income. Here certain sums are directed to be taken out of residue, and when taken out are to be held on certain trusts.

In my judgment the liability of residue has come to an end when those funds have been taken out of the estate, and have been set aside and invested. After that they have become four separate trust funds which have to be dealt with as separate trust funds, and I cannot charge residue with expenses which are really incurred in connection with those separate trust funds. The income fee is, in my judgment,

(1) [1936] Ch. 536.

(2) [1936] Ch. 747.

CROSSMAN really an expense in connection with the income of each trust fund, and the withdrawal fee is another expense in respect of the capital of each trust fund.

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On the whole I have come to the conclusion that both the income fee on the income of the settled legacies, and the withdrawal fee on the capital when withdrawn, ought to be borne by the settled legacies. The income fee must come out of the income of each settled legacy, and the withdrawal fee out of the capital of each settled legacy.

The costs of all parties as between solicitor and client of this application will come out of the residue.

Solicitors: *Syrett & Sons; Sharpe, Pritchard & Co., for Archibald Loy, Doncaster.*

E. K. C.

ADAMSON v. BIRKENHEAD CORPORATION.

BENNETT
J.

[1933. A. No. 1003.]

1936
Nov. 26.

Practice — Costs — Taxation — Apportionment — Repeal of R. S. C., Order LXV., r. 2 — Practice in Chancery Division before 1902 not revived — Effect of R. S. C., Order LXI., r. 1B.

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Feb. 18.

An order made in an action directed that the defendants were to have the costs of the action except the costs attributable to a particular issue, the costs on that issue to be the plaintiff's:—

Held, that the defendants were entitled to the general costs of the action and that the plaintiff was only entitled to the costs of proving the issue on which he succeeded and was not entitled to have the general costs of the action apportioned.

The repeal of R. S. C., Order LXV., r. 2, has not revived the practice which prevailed in the Chancery Division before 1902.

ADJOURNED SUMMONS.

The plaintiff commenced this action by writ issued out of the Liverpool District Registry. He claimed an injunction to restrain the defendants from causing a nuisance to certain lands of which he was owner. The nuisance complained of was that by the negligent making-up of a road known as Birch Avenue and the building of a sewer thereunder, the field drains had been damaged, with the result that the said lands had become waterlogged. The defendants denied negligence and pleaded the Public Authorities Protection Act, 1893, as a defence. The action was tried before Atkinson J. at the Liverpool Summer Assize in June, 1934, and judgment entered on July 2, 1934. The learned judge in dismissing the action directed that the defendants were to get their costs except such costs as were incurred by the plaintiff in proving that the making-up of Birch Avenue, apart from the making of the sewer, did obstruct his drainage. The order was drawn up in the following terms:—

“ This action having on the 21st, 22nd and 23rd days of June 1934 in the West Derby Division and on the 2nd day of July 1934 in the Salford Division of the County of Lancaster been tried before the Honourable Mr. Justice Atkinson (Judge

BENNETT of Assize) without a jury and the said judge having directed
J. that judgment should be entered for the defendants. The
1936 defendants to have the costs of the action (to be taxed as
ADAMSON between solicitor and client) except the costs attributable to
v. the issue of whether the work done in making up Birch
BIRKENHEAD Avenue caused the plaintiff's land to become waterlogged.
CORPORATION. The costs on that issue to be the plaintiff's and to be taxed
as between party and party. The two sets of costs to be
set off against each other as by the Associates Certificate
appears.

This Court doth order and adjudge that the plaintiff's claim for an injunction and damages be dismissed out of this Court but doth order that the plaintiff recover against the defendants his costs of the issue as to whether the work done in making up Birch Avenue in the pleadings referred to caused the plaintiff's land to become waterlogged such costs to be taxed as between party and party.

And this Court doth order and adjudge that the defendants recover against the plaintiff their costs of defence to this action to be taxed as between solicitor and client (excepting such costs as are attributable to the above mentioned issue) and to be set off against the plaintiff's said taxed costs."

The plaintiff and defendants carried in for taxation the bills of costs to which they respectively claimed to be entitled under the judgment, and these were taxed by the Registrar of the Liverpool District Registry, who taxed the plaintiff's bill at the sum of 82*l.* 12*s.* 9*d.* and the defendants' bill at 180*l.* 5*s.* 4*d.* The plaintiff lodged objections to this taxation on two grounds: first, that the Registrar had not apportioned the general costs of the action, and secondly, that he had misconstrued the words in the judgment: "The issue of whether the work done in making-up Birch Avenue caused the plaintiff's land to become waterlogged." The Registrar construed these words as meaning that the plaintiff was only entitled to recover the costs he had incurred in proving that the waterlogging of his land had been caused by negligence in the making-up of Birch Avenue exclusive of the sewerage of it and he disallowed the plaintiff all costs he had incurred

in attempting to prove that there had been negligence in constructing the sewer. Both objections were overruled, and the present application was, in effect, an appeal by the plaintiff against the decision.

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Gerald Upjohn for the plaintiff. The sole question is on the construction of the words of the judgment regarding costs and the effect of the repeal of Order LXV., r. 2, in 1929. Before 1902 in the Chancery Division general costs were apportioned: *Jenkins v. Jackson* (1); but an addition was made to the then existing Order LXV., r. 2, which precluded apportionment of costs: *George Holloway & Webb, Ltd. v. Crompton*. (2) Order LXV., r. 2, was repealed in 1929, and therefore the old practice must be referred to.

Waite for the defendants. The simple point is this, that where you get words like this you cannot look to what the Taxing Master would do in 1902, but what he should do now. The plaintiff cannot get more than the order gives him.

Gerald Upjohn in reply. The questions are: Ought the Master (1.) to have apportioned general costs, and (2.) to have disallowed the plaintiff's costs relating to the sewer?

Cur. adv. vult.

1937. Feb. 18. BENNETT J. This action was begun in the Chancery Division of the High Court of Justice by a writ issued out of the Liverpool District Registry. In it the plaintiff claimed an injunction to restrain the defendants from causing a nuisance to certain lands of which the plaintiff was the owner.

The nuisance was alleged to have been caused by the negligent construction by the defendants of a street known as Birch Avenue and the drains and sewers lying thereunder. The plaintiff's case was that in executing these works the defendants had cut through certain field drains draining his land, with the result that the land had become waterlogged.

The defendants denied the negligence, and as a public

(1) [1891] 1 Ch. 89.

(2) [1916] 2 Ch. 436.

BENNETT authority pleaded the Public Authorities Protection Act,
J. 1893, as a defence to the action.

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The action was tried before Atkinson J. at the Liverpool Summer Assize in the month of June, 1934, and on July 2, 1934, judgment was entered in the following terms: [His Lordship read the order and continued:] It appears from the pleadings and is clear from the transcript of the shorthand notes of the learned judge's judgment, that there were performed in Birch Avenue two separate operations: the first was the laying of the sewers, and the second was the making-up of the street. The first operation was carried out in the year 1927. The second operation, which was distinct from the first, was carried out in the month of July, 1928.

The plaintiff and the defendants carried in for taxation the bills of the costs to which they respectively claimed to be entitled under the judgment, and these were taxed by the learned Registrar of the Liverpool District Registry, who taxed the plaintiff's bill at the sum of 82*l.* 12*s.* 9*d.* and the defendants' at 180*l.* 5*s.* 4*d.*

The plaintiff lodged objections to this taxation, contending that upon two points of principle the Registrar had fallen into error.

The first objection in point of principle was that in taxing the two bills the Registrar had not apportioned any of the general costs of the action. The submission was that having regard to the form of the judgment the Registrar should have apportioned the general costs of the action incurred by the plaintiff and allowed him some part thereof as costs of the issue awarded to him by the judgment, and that in taxing the defendants' costs the Registrar should have apportioned the general costs incurred by him and disallowed some part thereof upon the footing that some part thereof had been incurred in connection with the issue of which they had been ordered to pay the plaintiff's costs. The Registrar had made no apportionment of the general costs.

To illustrate the plaintiff's point I will give two examples. He claimed that he should have been allowed some part of the costs he incurred in having his statement of claim settled.

He was allowed nothing in respect thereof. He claimed that there should be taxed off the defendants' bill some part of the costs they had incurred in having their statement of defence settled. Nothing was taxed off.

This is the substance of the first ground of objection to the taxation.

The second objection was based upon the submission that the learned Registrar had misconstrued the words in the judgment: "The issue of whether the work done in making-up Birch Avenue caused the plaintiff's land to become waterlogged." The Registrar construed these words as meaning the plaintiff was only entitled to recover the costs he had incurred in proving that the waterlogging of his land had been caused by negligence in the making-up of Birch Avenue exclusive of the sewerage of it, and he disallowed the plaintiff all the costs he had incurred in attempting to prove that there had been negligence in constructing the sewer under Birch Avenue. The learned Registrar overruled both these objections, and the present application is in effect an appeal by the plaintiff against this decision.

I will give my judgment first on the first objection. The plaintiff's argument was rested entirely on the repeal on January 1, 1930, of r. 2 of Order LXV. That rule read as follows: "When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact shall, unless otherwise ordered, follow the event. And an order giving a party costs except so far as they have been occasioned or incurred by or relate to some particular issue or part of his proceedings shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, but the Court or judge, if the whole costs of the action are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment of such proportion thereof as the Court or judge shall determine." It was admitted by Mr. Upjohn, on behalf of the plaintiff, that if r. 2 of Order LXV. had been in force at the date of the judgment, he would have been unable to

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BENNETT support the first objection taken on behalf of the plaintiff.
 J. The effect of the judgment interpreted by the rule would have
 1937 been to give to the defendants the costs of the action,
 ADAMSON excluding only the sum by which those costs had been increased
 v. by the issue upon which they had failed, and to confine the
 BIRKENHEAD plaintiff to the costs of the issue awarded to him. There
 CORPORATION would have been no apportionment: *George Holloway & Webb,*
 TION. *Ld. v. Crompton.* (1) In Sargant J.'s judgment in that case (1)
 he states the history of the rule in a passage which I will now
 read: "Until the year 1902 r. 2 of Order LXV. consisted
 only of what is now the first sentence of that rule; and while
 that was the case the practice of this Court was well settled,
 and there could, I think, have been no doubt as to the effect
 of an order in the present form. If a party was not ordered
 to pay or was given the costs of a particular issue he was
 relieved of or given, as the case might be, not only the costs
 of that particular issue, but also an apportioned part of the
 general costs of the action. To limit the costs of the issue
 merely to such extra or increased costs as had been occasioned
 by the addition of the issue it was necessary to use words
 expressing that it was the increased costs only which were
 being excluded or given. This is quite clearly stated in the
 4th edition of Seton on Decrees, vol. i., pp. 129 and 130, and
 in the 5th edition of the same work, vol. i., pp. 226 and 227,
 and is undoubtedly the result of such cases as *Knight v.*
Purssell (2); *Jenkins v. Jackson* (3); and *Harley v. Hunt.* (4)
 But then came the addition made in January, 1902, which
 is in the following terms: 'And an order giving a party
 costs except so far as they have been occasioned or incurred
 by or relate to some particular issue or part of his proceedings
 shall be read and construed as excluding only the amount
 by which the costs have been increased by such issue or
 proceedings, but the Court or judge, if the whole costs of the
 action are not intended to be given to the party, may,
 wherever practicable, by the order direct taxation of the
 whole costs and payment of such proportion thereof as the

(1) [1916] 2 Ch. 436, 441.

(3) [1891] 1 Ch. 89.

(2) (1879) 28 W. R. 90; 49 L. J. (Ch.) 120. (4) (1887) W. N. 184.

Court or judge shall determine.' This addition plainly consists of two parts operating in entirely different ways. By the first part a rule of construction is applied to orders couched in one or other of three alternative forms; by the second part a discretion is given to the Court to award in suitable cases a proportion of the whole costs of the action in lieu of awarding the costs of a particular part of the action."

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Now the plaintiff's argument, resting entirely on the repeal of r. 2 of Order LXV., was that the well settled practice of the Chancery Division in taxing costs under an order in the form of the judgment in the present case, as stated by Sargant J., was restored.

This argument has, in my judgment, overlooked an important consideration bearing upon the force of it.

Before 1902 there were two separate offices in the Supreme Court in which bills of costs were taxed. There was the Chancery Taxing Office, of which there were Masters who taxed the bills of costs ordered to be paid in actions tried in the Chancery Division. There were also Masters of the Supreme Court who taxed the bills of costs ordered to be paid in actions tried in the King's Bench Division. As appears from the report of *Jenkins v. Jackson* (1), the practice of the Chancery Taxing Masters differed from that of the Common Law Masters in the principles they applied when taxing costs awarded by a judgment or order in the form of the judgment in the present case. Under such an order the Chancery Masters would have apportioned the general costs, whilst the Common Law Masters would not.

When in 1902 the addition referred to by Sargant J. was made to r. 2 of Order LXV., a rule was made amalgamating the Chancery Taxing Office with the Central Office of the Supreme Court, and r. 1B of Order LXI. was added to the Rules of the Supreme Court in 1903. That rule read as follows: "The Chancery Taxing Masters transferred to the Central Office by virtue of Rule 2 of the Rules of the Supreme Court of January, 1902, and all persons appointed as Taxing Masters of the Supreme Court, hereinafter called Masters of the

BENNETT Supreme Court (Taxing Office) shall be Masters of the Supreme Court. The Masters of the Supreme Court (Taxing Office) shall have power and jurisdiction to tax and settle all costs, charges and expenses taxed in the Central Office, or directed by any statute to be taxed or settled by a Master of the Supreme Court, or by any master as the prescribed authority shall be under the control and superintendence of the Masters of the Supreme Court (Taxing Office), and they shall perform the duties thereof, but save and except the taxation of costs and all duties incidental thereto or consequent thereon the Masters of the Supreme Court (Taxing Office) shall not perform any other duties hitherto performed by Masters of the Supreme Court."

The effect of these changes in the Rules seems to me to have been to establish one Taxing Office, the Masters of which taxed bills of costs of actions tried in the Chancery Division and the King's Bench Division, and to abolish the Chancery Taxing Office, and in taxing costs under such a judgment as the present to establish the principles of taxation theretofore applied in such cases by the Common Law Masters.

The plaintiff's argument must be considered in the light of those matters.

The difference in practice which existed before 1902 between the Taxing Officers of the two Divisions was not based upon any judicial interpretation of the language of the Orders. The practice before 1902 differed in the two Divisions, not because there had been any decision by the judges of one Division that the language of an Order meant one thing, whilst the same language had been decided by the judges of the other Division to mean something else. It differed because of the difference in understanding by the Taxing Officers of the separate Taxing Offices of the same language: *Jenkins v. Jackson*. (1)

Now to give effect to Mr. Upjohn's argument would inevitably lead to a restoration of the difference in practice between the methods of taxing bills of costs of actions tried in the Chancery

Division and bills of costs in actions tried in the King's Bench Division. BENNETT
J.

I will now read the concluding passage of Bowen L.J.'s judgment in *Jenkins v. Jackson* (1): "I have been constantly pressed for the last twelve years during which I have been a Judge, with the difference of opinion and practice that exists as to taxations in the Chancery Division and the Queen's Bench Division, and it seems to me that nothing could be more important than that this difference should be methodically inquired into with a view to establishing a uniformity of practice in this respect between the two Divisions." 1937
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It would be lamentable, in my judgment, to give effect to the plaintiff's argument unless one is compelled to do so.

Now there is nothing in the language of the judgment which settles this matter either in favour of the plaintiff or the defendants. The question is: What has been the practice of Taxing Officers since January 1, 1930? The very experienced and learned Registrar who taxed the bills now in question had no doubt about it. I have inquired of the Chief Master of the Supreme Court, and he informs me that the repeal of r. 2 of Order LXV. has made no difference to the practice of the Masters of the Supreme Court Taxing Office and that they never apportion where an order or judgment gives one party the costs of an action, except so far as they relate to a particular issue, and to the other party the costs of the issue.

I, therefore, propose to hold, with respect to the plaintiff's first objection, that the learned Registrar was right in the principle he applied.

As regards the second objection taken by the plaintiff. I hold that the learned Registrar was right in overruling this. The transcript of the shorthand note of Atkinson J.'s judgment makes it clear that he distinguished between the sewerage of Birch Avenue and the making-up of it and regarded these as two separate issues. On the first he found that the sewerage had not caused the plaintiff's land to become

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J. of the Avenue was the cause of the waterlogging.

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In the light of these facts I decide that the plaintiff is not
to be paid any of the costs incurred by him in his attempt
to prove that the sewerage was a cause of the waterlogging
of his land. The result is that the summons fails and must
be dismissed with costs.

Solicitors for the plaintiff : *Jaques & Co., for Harling & Co.,
Liverpool.*

Solicitors for the defendants : *Hamblins, Grammer & Hamlin,
for Thompson, Rigby & Co., Birkenhead.*

R. A. Y.

In re MORTIMERS (LONDON) LIMITED.BENNETT
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[0037 of 1934.]

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Feb. 15, 23;
Mar. 4.

Company—Members' voluntary liquidation—Subsequent compulsory liquidation—Method of fixing remuneration of voluntary liquidator—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 175, sub-s. 1; s. 232; s. 305, sub-s. 2—Companies (Winding-up) Rules, 1929, r. 192, sub-r. 1.

Where a members' voluntary liquidation of a company is superseded by compulsory liquidation, the Court is empowered by r. 192, sub-r. 1, of the Companies (Winding-up) Rules, 1929, to review the amount of remuneration fixed by the members of the company, during the voluntary liquidation, as payable to the voluntary liquidator.

SUMMONS.

At an extraordinary general meeting of Mortimers (London), Ltd., held on March 31, 1933, it was resolved that the company be wound up voluntarily and a liquidator was appointed for the purpose of the winding up. The directors had made the statutory declaration of solvency required by s. 230.

At a general meeting of the company held in December, 1933, pursuant to the provisions of s. 232 of the Companies Act, 1929, the remuneration of the voluntary liquidator was fixed by the members at 550*l*.

On January 29, 1934, an order for the compulsory winding up of the company was made on a petition presented by a creditor. The senior official receiver in companies liquidation was appointed liquidator.

On August 1, 1935, the assistant official receiver wrote to the voluntary liquidator to the effect that he was advised that the voluntary liquidator should submit his account to be passed by the Court and apply to the Court to fix his remuneration under r. 192, sub-r. 1, of the Companies (Winding-up) Rules, 1929.

On August 20, 1935, the voluntary liquidator wrote a letter in reply claiming that the proceedings in the voluntary liquidation, including the fixing and the receipt of his remuneration, were to be deemed as having been validly

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taken under the provisions of s. 175 of the Act, and that, therefore, no question arose of his remuneration being fixed or of his account being passed by the Court. The letter proceeded to set out the procedure which the voluntary liquidator had adopted and to allege that the voluntary winding up had proceeded to its end and that the remuneration was, therefore, properly fixed at the general meeting held in pursuance of s. 232 of the Act.

A summons was taken out by the official receiver and liquidator for (inter alia) an order fixing the amount of remuneration, if any, payable by the applicant to the voluntary liquidator out of the assets of the company for his services as liquidator in the winding up of the company.

J. B. Lindon for the applicant. The answer to the question whether the remuneration awarded to the voluntary liquidator at the statutory meeting can be taken by him or whether the Court has power to review that remuneration in the compulsory liquidation depends on whether r. 192, sub-r. 1, of the Companies (Winding-up) Rules, 1929, is an overriding rule or whether it is governed by the provisions of s. 175 of the Act. (1)

Harold Christie K.C. and *Hon. Denys Buckley* for the respondent, the voluntary liquidator. Where, as in the present case, there is no proof of fraud or mistake, the remuneration fixed in the voluntary liquidation cannot, having

(1) By s. 175 of the Companies Act, 1929, it is provided: "(1.) Where before the presentation of a petition for the winding up of a company by the court a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken."

By r. 192, sub-r. 1, of the Com-

panies (Winding-up) Rules, 1929, it is provided: "The assets of a Company in a winding up by the court remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets, including where the Company has previously commenced to be wound up voluntarily such remuneration, costs, and expenses as the court may allow to a Liquidator appointed in such Voluntary winding up shall, subject to any order of the Court . . . be liable to the following payments"

regard to the provisions of s. 175, sub-s. 1, be reviewed in the compulsory liquidation. BENNETT J.

The Act is the governing consideration in relation to a statutory rule. Therefore, if there is any difficulty in reconciling s. 175 with r. 192, sub-r. 1, the rule must be construed as subordinate to the section. The meeting held in December, 1933, was convened so that the members might fix the remuneration of the voluntary liquidator and they did so.

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1937. March 4. BENNETT J. The question whether there is a right to have the remuneration voted to the voluntary liquidator by shareholders reviewed, depends upon a rule in the Winding-up Rules—r. 192—and s. 175 of the Companies Act, 1929. This liquidation started as a members' voluntary liquidation, the kind of liquidation which is based upon the view that the company is solvent, and that all the creditors will be paid in full within twelve months from the commencement of that liquidation. In such a liquidation it is provided by s. 232 of the Act that the remuneration to be paid to the liquidator may be fixed by the company in general meeting, that is upon the footing, of course, that the remuneration to be paid to the man who is to wind up the company is to be paid out of the money to which those who fix the remuneration are or will be entitled. In a creditors' voluntary liquidation, a liquidation which proceeds upon the footing that there will be nothing for the members and that the creditors are the persons concerned and interested in the assets to be got in and realized, the remuneration of the liquidator is fixed under the provisions of s. 241 of the Act. Under that section the committee of inspection or, if there is no such committee, the creditors may fix the remuneration to be paid to the liquidator. In the present case the liquidation is neither a members' voluntary liquidation nor a creditors' voluntary liquidation. It has become, as the result of the winding up order, a compulsory liquidation, that is to say, a winding up by the Court, and the distribution of assets in

BENNETT J. such a winding up is fixed by r. 192 of the Companies (Winding-up) Rules of 1929, a rule which has statutory force under the provisions of s. 305 of the Act. Sect. 305, sub-s. 2, of the Act of 1929, provides that : “ All rules made under this section shall be laid before Parliament within three weeks after they are made, if Parliament is then sitting, and, if Parliament is not sitting, within three weeks after the beginning of the next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act.” Rule 192 provides : [His Lordship read the rule and continued :] The important words of that rule are : “ The assets of a Company in a winding up by the Court remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets including, where the Company has previously commenced to be wound up voluntarily, such remuneration, costs and expenses as the Court may allow to a liquidator appointed in such voluntary winding up.” The rule has to be read in connection with s. 175 of the Act which provides : [His Lordship read the section and continued :] It is argued on behalf of the respondent to the summons that the Court has no power to review the remuneration voted to him by the members of the company because the voting of it to him by the members of the company was a proceeding taken in the voluntary winding up and because it has not been proved that there was any fraud or mistake in connection with that proceeding and that there is no inconsistency between the language of s. 175 and the provisions which are to be found in r. 192, the argument being that the reference to the remuneration to be paid to a liquidator in a voluntary liquidation in r. 192 only applies in a case where, when the compulsory liquidation supersedes the voluntary liquidation, there has been no assignment to the voluntary liquidator either by the creditors or by the shareholders of any remuneration. I do not take that view of the construction of the rule and the section put together. They have to be read together, and, so reading them, the language is, in my judgment, wide enough to enable the Court, in any case where a voluntary liquidation has been superseded by a compulsory order, to review any

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remuneration that has been voted to the liquidator by the members, if it is a members' voluntary liquidation, or by the committee of inspection, or the creditors, if it is a creditors' voluntary liquidation.

For these reasons, in my judgment, the applicant is entitled to have the remuneration voted to the respondent by the members of the company reviewed by the Court and is entitled to an order that if upon that review it is found that the respondent has been overpaid he shall repay the excess. I propose to refer it to the registrar to fix the remuneration properly payable to the respondent as voluntary liquidator, and if as a result of this inquiry it should be found that he has been paid more than his proper remuneration, to order the respondent to pay to the applicant the surplus.

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Solicitors : *Stafford Clark & Co. ; Champion & Co.*

J. L. D.

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Nov. 5, 6,
10, 11, 12,
13, 17, 18,
19, 20.

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Jan. 14, 27.

[1935. S. 1415.]

Copyright—Conversion—Damages—Act of conversion—Limitation of time for commencement of action—Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), ss. 6, 7, 10, 35.

C. having published a book which incorporated part of a book already published by S., S. brought an action against C. for damages both for infringement of copyright and for conversion. C. admitted both infringement and conversion and offered to pay damages for either infringement or conversion, but not for both. The Court of Appeal decided on a point of law that the damages were cumulative and not alternative, and the action came on for assessment of damages and a decision whether or not damages for conversion came under the limitation of the time for commencement of an action in respect of infringement of copyright to three years next after the infringement, imposed by s. 10 of the Copyright Act, 1911:—

Held, (1.) that, as the expression “an action in respect of infringement of copyright” was wide enough to cover the claim for damages for conversion, the limitation by s. 10 applied to the conversion, (2.) that the time ran from the infringement and that the infringement was the printing of the infringing copies, and the claim for damages for conversion was limited to copies printed within three years before the issue of the writ, and (3.) that the conversion at the date of which the value of the infringing copies must be assessed was the order by C. to the binders to bind the unbound sheets containing the infringing copies into the bound copies of C.’s book.

Ash v. Dickie [1936] Ch. 655 distinguished.

WITNESS ACTION.

The plaintiffs in this action, being publishers, claimed an injunction to restrain the defendants, also publishers, from infringing the plaintiffs’ copyright in a literary work entitled “Heating and Ventilating,” and an inquiry as to the damages suffered by the plaintiffs by reason of the defendants’ infringements and conversion by their publication of a book entitled “Modern Practical Plumber,” Volume III., containing extracts from the plaintiffs’ book.

The writ was issued on May 2, 1935.

By their defence the defendants admitted the infringement by the reproduction in their book of substantial parts of the

plaintiffs' book, and submitted to the injunction claimed and to the inquiry as to the damages suffered by the plaintiffs by the infringement which were recoverable in this action, or alternatively for the conversion of infringing copies of parts of the plaintiffs' work which were recoverable in this action, but not for both; and the defendants offered to pay the costs of this action up to a motion for judgment, the costs of an inquiry being reserved. Two points of law arose upon this defence: (a) Whether the plaintiffs were entitled in the action both to damages for infringement under s. 6, sub-s. 1, of the Copyright Act, 1911, and also to damages for conversion under s. 7 of the Act; and (b) whether the limit of time for an action to three years after infringement provided for by s. 10 of the Copyright Act, 1911, applied to damages for conversion.

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The action was set down for trial on these points of law, and was heard by Farwell J. on November 6, 1935, when the learned judge decided the first question in the negative, but did not deal with the second question. His decision was reversed on February 7, 1936, by the Court of Appeal, who held unanimously that damages under s. 6, sub-s. 1, and s. 7 of the Copyright Act, 1911, were cumulative and not alternative, but did not decide the second question. (1)

The parties agreed that the inquiry as to damages should not be referred to a Master, but requested Crossman J. to deal with the inquiry so as to avoid the expense and delay of a reference to a Master, and references to the Court to determine questions of law which would arise, and probably an application to the Court to vary the Master's certificate. The inquiry now came on in Court before Crossman J. The plaintiffs called witnesses as to the amount of the damages alleged to have been suffered by them.

K. E. Shelley for the plaintiffs. This is now practically an inquiry as to damages. All the relevant facts and figures have been agreed, and the matter need not go to a Master. I say that the sale and delivery of copies of the infringing

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matter constituted conversion. I submit that in estimating the amount of conversion you cannot split up pages and count words, but must take each page on which there is infringing matter in calculating the amount of conversion. No action which is not within the terms of ss. 1 and 2 of the Copyright Act, 1911, is an action for infringement of copyright. An action for conversion is not an action for infringement. Sect. 6 of the Act sums up ss. 2 and 3 and gives the remedies for infringement of copyright. Sect. 7 deals with the conversion of the infringing matter and the remedies of the owner of the copyright for such conversion, and is independent of the preceding matter. Sect. 35 defines the meaning of infringement and does not apply to conversion. This action is partly for infringement and partly for conversion, and the claims which the plaintiffs make are independent, as was held by all the judges in the Court of Appeal. (1) Damages for infringement may be very large, but damages for conversion are more limited. The Master of the Rolls distinguished between the infringer and the person who is guilty of conversion, but not necessarily of infringement. The act which constitutes conversion, I say, is not necessarily the same as the act which constitutes infringement, and s. 10 only applies to infringement and not to conversion. The date of conversion must be the printing of the infringing book, and if s. 10 applies to conversion I can only claim for books printed within three years of the issue of the writ. There may be circumstances in which a claim for conversion may arise under s. 7 without there having been any infringement. I submit therefore that s. 10 does not apply to a claim for conversion, and that I am entitled to go back to six years from the issue of the writ.

Hon. S. O. Henn Collins K.C. and E. J. Macgillivray for the defendants. We make the following propositions: (1.) Does s. 10 apply to the whole of the claim or only to infringement? We say to the whole of the claim. (2.) From what date does it run? We say from the first printing after May 2, 1932. (3.) On what act must the plaintiffs rely? We

say the giving of an order to bind the sheets. (4.) What was the chattel converted at that date? We say the unbound sheets. (5.) What was the value of the chattel at that date? We say one twenty-sixth of the whole volume.

Copyright is wholly the creation of statute and nothing can be referred to except the statute. All the consequences of and remedies for infringement are laid down by statute. Sect. 7 is not available unless invasion of the plaintiffs' sole right is shown. It is not true that s. 7 provides a new cause of action. In ascertaining the value of the plaintiffs' chattel we cannot assume that all the parts of the whole work are of the same value. The most valuable parts of the plaintiffs' work need not be the most valuable parts of the defendants' work.

The basis of the damages for infringement must be the diminution of the plaintiffs' sale in consequence thereof, and we submit that the plaintiffs' witnesses have not shown any such diminution. In *Ash v. Dickie* (1), the newspaper case, the printing brought the infringement into existence, but that is not so in the case of a book. The plaintiffs cannot take advantage of the defendants' subsequent expenditure on the chattel. See Lord Macnaghten's judgment in *Peruvian Guano Co. v. Dreyfus*. (2) The infringing matter is shown by the evidence not to be the most valuable part of the plaintiffs' book. Asportation is not necessarily conversion: *Williamson v. Verity* (3); *Oakley v. Lister*. (4) Only those portions of the book on which there are infringing passages have to be considered. As to what is conversion, see *Reckitt v. Barnett* (5) and Halsbury's Laws of England, vol. 27, p. 892.

The plaintiffs say that here it is the printing or acceptance of the printed sheets by the defendants. There were expenses necessary before the unbound sheets could be sold, but those were not on behalf of the plaintiffs' property. Nobody would have bought the unbound sheets. The proportions appear in the agreed documents.

(1) [1936] Ch. 655.

(2) [1892] A. C. 166, 174.

(3) (1871) L. R. 6 C. P. 206.

(4) [1931] 1 K. B. 148.

(5) [1928] 2 K. B. 244.

CROSSMAN J. *Shelley* in reply. All the defendants' arguments have already been discussed in the Court of Appeal. The draftsman of the Copyright Act, 1911, imported into it all the common law authorities on conversion. Every action under the Act is for the invasion of the sole right of the plaintiff: *Ash v. Hutchinson & Co. (Publishers), Ltd.* (1) Sect. 7 gives a wholly different right, which is not one of those referred to in the marginal note to s. 6. Under s. 7 an injunction can be obtained against a wholly innocent bookseller who has converted by selling an infringing book, as was referred to by both the Master of the Rolls and Greene L.J. Proceedings for conversion are quite different from proceedings for infringement, which are in reference to ss. 1 and 2. It is not essential that every ingredient of s. 7 should be complied with: *John Lane The Bodley Head, Ltd. v. Associated Newspapers, Ltd.* (2) In 99 cases out of 100 the damages for conversion are much larger than those for infringement. It is reasonable that in an action for conversion the six years' limit should apply. If the words in s. 8 include actions under s. 7 then an innocent converter, who has no knowledge of an infringement, is apparently not liable to damages for conversion but is liable to an injunction. Defendants say that the order to bind is the act of conversion, but I submit that this cannot be so: see *Miller v. Dell* (3) and *Williamson v. Verity*. (4)

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1937. Jan. 14. CROSSMAN J. The writ in this action was issued on May 2, 1935, and the statement of claim was delivered on May 3, 1935. The defendants by their defence, which was delivered on May 24, 1935, admitted that the third volume of "The Modern Practical Plumber" constituted an infringement of the plaintiffs' copyright in parts of "Heating and Ventilating," and, while relying on s. 10 of the Copyright Act, 1911, and the Statute of Limitations, they offered to submit to a limited judgment on their admissions. This offer is stated in paras. 5, 6 and 7 of the defence and is as

(1) [1936] Ch. 489.

(2) [1936] 1 K. B. 715.

(3) [1891] 1 Q. B. 468.

(4) L. R. 6 C. P. 206.

follows: "5. The defendants offer to submit to judgment for an injunction as claimed and to an inquiry as to what parts of the plaintiffs' said book have been reproduced in the defendants' said book and as to what damages the plaintiffs have suffered by the infringement by the defendants of the copyright in their said book which are recoverable in this action, or alternatively as to what damages the plaintiffs have suffered by the conversion of infringing copies of parts of their said book which are recoverable in this action. 6. The defendants offer to extract from each and every copy of their said book now in their possession or control and to deliver up to the plaintiffs all such parts as shall be found to have been reproduced from the plaintiffs' said book and all plates used or intended to be used for the reproduction of the same. 7. The defendants offer to pay the costs of this action up to and including the costs of a motion for judgment and of any order to which the plaintiffs may be entitled on this defence the costs of the inquiry (if ordered) being reserved." But questions arose as to what the plaintiffs were on the defendants' admissions entitled to. The first question was whether the plaintiffs were entitled both to damages for infringement under s. 6, sub-s. 1, of the Copyright Act, 1911, and to damages for conversion under s. 7 of the Act. The second question, which arose only if the first was answered in the affirmative, was whether the limit of time of three years provided for by s. 10 of the Copyright Act, 1911, applies to a claim for conversion under s. 7. Farwell J. on November 6, 1935, decided the first question in the negative, and did not deal with the second question. The Court of Appeal on February 7, 1936, reversed the decision of Farwell J. on the first question, and held that the remedies given to the owner of copyright by s. 6, sub-s. 1, and s. 7 respectively of the Copyright Act, 1911, are cumulative and not alternative, but did not decide the second question. (1) In these circumstances I have now to decide what damages the plaintiffs are entitled to. This is substantially an inquiry as to damages, which would in ordinary circumstances be referred to Chambers. But the inquiry involves

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CROSSMAN J. requested me to deal with it in order to avoid the expense and delay of a reference to the Master, and references back to the Court to determine the questions of law, and probably in the end an application to the Court to vary the Master's certificate.

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The parties have agreed certain documents, which are marked A, B, C, D, E, F, G, H, and I respectively, and I think that, when the questions of law are determined, there should be no difficulty with the assistance of these documents in determining the amount of the damages. In addition to these agreed documents I have heard oral evidence adduced by the plaintiffs and by the defendants.

Having regard to the decision of the Court of Appeal given in this action on February 7, 1936 (1), I proceed on the basis that the remedies given by s. 6, sub-s. 1, and s. 7 respectively of the Copyright Act, 1911, are cumulative and not alternative, and that, though (as the Master of the Rolls pointed out in his judgment) (2) in some cases there may be an overlapping of the damages under the two sections, there are two separate and diverse causes of action, each of which must receive appropriate consideration. The claim for damages under s. 6 is a claim for a wrong done to an incorporeal right, that is to say copyright, the measure of damages being the depreciation caused by the infringement to the values of the copyright, while the claim for damages under s. 7 is a claim for conversion of particular chattels, the infringing copies, the measure of damages being the value of the infringing copies which by force of the statute are deemed to be the property of the plaintiffs from the mere fact of being brought into existence.

The first question which I have to determine is whether the plaintiffs' claim for damages for conversion of the infringing copies under s. 7 of the Act is (as the claim for damages for infringement of copyright under s. 6 of the Act clearly is) affected by s. 10 of the Act, which provides that "an action in respect of infringement of copyright

(1) [1936] Ch. 323, 332.

(2) Ibid. 336.

shall not be commenced after the expiration of three years next after the infringement." This question depends upon the construction of the Act, and for the purpose of determining it I have to look at the group of sections 6 to 10 which are grouped under the heading "Civil Remedies." Counsel for the plaintiffs contended that s. 10 means "an action so far as it is an action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement," and that the present action, so far as it is an action for damages for conversion of infringing copies, is not an action in respect of infringement of copyright. He pointed out that, by reason of the definition of "infringing" in s. 35 of the Act, which enacts (by sub-s. 1) that in the Act, unless the context otherwise requires, "infringing" when applied to a work in which copyright subsists means any copy including any colourable imitation made or imported in contravention of the provisions of the Act, there may be infringing copies to which s. 7 applies without there having been any act of infringement. For instance, if a copy of a copyright work made in the United States of America, as to which the owner of the copyright has given notice to the Commissioners of Customs and Excise under s. 14 of the Act, is imported into the United Kingdom by an innocent person in contravention of s. 14, it becomes under the definition in s. 35 an infringing copy, but there has been no infringement of copyright within the meaning of the Act. Counsel for the plaintiffs argued that, even if the expression "an action in respect of infringement of copyright" in s. 10 is wide enough to include proceedings in respect of the conversion of infringing copies under s. 7, it would be wrong so to construe the expression in view of the fact that s. 10 fixes the time of limitation by reference to "the infringement," and there may be in one state of circumstances at all events proceedings under s. 7 without there having been any infringement. In this action, however, the defendants have infringed the plaintiffs' copyright, and in my judgment the expression "an action in respect of infringement of copyright" in s. 10 is wide enough to cover the plaintiffs' claim in this action for damages

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Co.
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CROSSMAN for the defendants' conversion of the infringing copies of the plaintiffs' work, and in the circumstances I do not think that the fact that there may be some other state of circumstances in which the claim for damages for conversion under s. 7 may arise without there having been any infringement of copyright is sufficient ground for holding that s. 10 does not apply to the plaintiffs' claim in this action for damages for conversion under s. 7. I hold, therefore, that s. 10 of the Copyright Act, 1911, applies to the plaintiffs' claim for damages for conversion under s. 7 as well as to their claim for infringement of copyright under s. 6. If I am right as to the first question, time runs against the plaintiffs on their claim for damages for conversion from what is referred to in s. 10 as "the infringement," and this in the present case is in my judgment the printing by the defendants of the infringing copies of Volume III. of "The Modern Practical Plumber." I hold therefore that the plaintiffs' claim for damages for conversion under s. 7 is limited to copies printed within three years before the issue of the writ in this action, that is to say, since May 2, 1932.

It is common ground that the measure of damages for conversion under s. 7 is the value of the infringing copies at the date of the conversion, and the next question which I have to determine is, What is the act of conversion at the date of which the value of the infringing copies must be ascertained? The defendants say that either the order given by them to their printers and binders to bind the unbound sheets of "The Modern Practical Plumber," or the acceptance by the defendants of the delivery by their printers and binders of the completed volume is the material act of conversion. The plaintiffs say that the delivery by the defendants of the completed volume to their purchasers is the material act of conversion.

The "infringing copies" became the property of the plaintiffs by force of s. 7 of the Act from the mere fact of being brought into existence. In my judgment the "infringing copies" in the present case are the parts of the unbound sheets of Volume III. of "The Modern Practical Plumber" on which the printers by the order of the defendants printed the passages

copied from "Heating and Ventilating." In my judgment the conversion at the date of which the value of the infringing copies must be assessed is the first act of conversion after the infringing copies came into existence. The question therefore is, What was the first act which the defendants did after the infringing copies came into existence which amounted to a conversion of them? Merely allowing their agents the printers to remain in possession of the infringing copies was not in my judgment a conversion by the defendants, since it was not necessarily adverse to the plaintiffs. But the order to the binders to bind the unbound sheets which contained the infringing copies into the bound copies of Volume III. of "The Modern Practical Plumber" was in my judgment a conversion of the infringing copies, and not a trespass only, because it was a dealing with the chattels which necessarily implied an intention on the part of the defendants to assert a right which was inconsistent with the right of the plaintiffs. The case of *Ash v. Dickie* (1), where the sale by the defendant company of its newspaper was held to be the conversion, is in my opinion distinguished from the present case by the fact that in that case nothing was done by the defendant company between the printing of the newspaper which constituted the infringement and the sale.

The next question is, What was the value of the infringing copies, that is to say, the parts of the unbound sheets of Volume III. of "The Modern Practical Plumber" on which the passages copied from "Heating and Ventilating" were printed, at the time when the order to the printer to bind the unbound sheets was given? In my judgment the proper method of arriving at the value of the infringing copies is to treat them as forming parts of what Romer L.J. in *Ash v. Dickie* (2) called "the composite chattel", and to assess the value of the composite chattel as a whole, and then to estimate what proportion of that value ought to be attributed to the infringing copies.

In my judgment the contention of the defendants' counsel that the basis on which the value of the unbound printed

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(1) [1936] Ch. 655, 669.

(2) Ibid. 655, 663.

CROSSMAN sheets ought to be assessed is the cost of the paper and printing
 J. or the price which the printer received for them is wrong.
 1937 As the Master of the Rolls said in *Ash v. Dickie* (1) "in
 SUTHERLAND estimating damages for conversion the question is not what
 PUBLISHING Co. it has cost to produce the article, but what the article is worth."
 v. In my judgment the only way in which I can put a value
 CAXTON upon the unbound printed sheets is to ascertain what they
 PUBLISHING Co. fetched when bound and sold and what it cost to bind them
 and to deduct the cost of binding from the sale prices, and
 on this basis I assess the value of the unbound printed sheets
 at 20s. a set. In my judgment the proportion of that value
 which ought to be attributed to the infringing copies ought
 not to be arrived at either by the word method contended
 for by the defendants or by the leaf method contended for
 by the plaintiffs. The oral evidence which I have heard does
 not assist me in arriving at that proportion. In my judgment
 the proportion can only be estimated by an examination of
 the books, and after looking at the agreed documents F and
 G, being copies of the plaintiffs' and defendants' books in
 which the infringing passages are underlined, and considering
 the agreed documents C, D, and E, I estimate the proportion
 at one-twentieth. Exercising what the Master of the Rolls in
 his judgment in *Ash v. Dickie* (2) called "rusticum iudicium",
 I assess the plaintiffs' damages for conversion under s. 7 of
 the Copyright Act, 1911, at 150*l*.

I have now to consider what damages (if any) the plaintiffs
 have suffered by reason of the defendants' infringement of
 the copyright in "Heating and Ventilating" and how far these
 damages are covered by the damages which I have awarded
 to the plaintiffs for the defendants' conversion of the infringing
 copies. The measure of damages is the depreciation caused
 by the infringement to the value of the copyright, the
 infringement being limited to the printing by the defendants
 of infringing copies of Volume III. of "The Modern Practical
 Plumber" since May 2, 1932. The damages may consist
 (1.) of loss by the plaintiffs of sales of copies of "Heating
 and Ventilating" and (2.) of injury to the reputation of

(1) [1936] Ch. 655, 663.

(2) Ibid. 655, 664.

the plaintiffs as the publishers of "Heating and Ventilating." CROSSMAN J.
 The only evidence which I have on the first head is the material
 contained in agreed document "A," giving the numbers of 1937
 "Heating and Ventilating" sold, and on this evidence I do SUTHERLAND
 not find that the plaintiffs have suffered any loss of sales, PUBLISHING
 and I cannot award them anything more than nominal damages Co.
 on this head. On the second head I infer from the evidence v.
 that the plaintiffs have suffered in reputation from the fact CAXTON
 that the book "Heating and Ventilating" published by them PUBLISHING
 contains passages which are practically identical with passages Co.
 in the larger and more comprehensive book "The Modern
 Practical Plumber," published by the defendants, the natural
 conclusion being that the larger and more expensive book is
 the original; and I assess the damages which the plaintiffs
 have suffered in this way at 50*l.* These damages are inde-
 pendent of the damages which I have awarded to the plaintiffs
 for the defendants' conversion of the infringing copies, and
 I hold that the plaintiffs are entitled by way of damages to
 150*l.* as well as 50*l.*

Jan. 27. The question of the costs was reserved, as the
 defendants had paid 250*l.* into Court in satisfaction of damages
 on May 15, 1935; and Crossman J. on January 27, 1937,
 gave judgment that the plaintiffs should have the costs of
 the action down to the date of payment into Court, and
 that the defendants should have the subsequent costs.

Solicitors for the plaintiffs: *White & Leonard & Nicholls & Co.*

Solicitors for the defendants: *Oswald Hickson, Collier & Co.*

E. K. C.

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LEWIS v. PLUNKET.

[1936. L. 1742.]

Mortgage—Title deeds in possession of mortgagee—No payment of interest or acknowledgment of debt by mortgagor for more than twelve years—Right of mortgagor to possession of title deeds.

Where the owner of a legal estate in fee simple in land executes a mortgage and hands over the mortgage and other title deeds to the mortgagee, but fails to pay any interest on the mortgage or give any acknowledgment of the mortgage debt for more than twelve years, the mortgagee loses all title to the land and the mortgagor can recover possession of the mortgage and other title deeds.

ACTION.

In 1921 the plaintiff was in occupation as tenant of a house known as "Salwick," Seabrook Road, Hythe. An opportunity occurred which would enable her to purchase the freehold of the premises for 2000*l.* She was not in a position to find the whole of the money and she obtained from the defendant, a lady with whom she was on friendly terms, a loan of 1600*l.* She then completed the purchase and received the title deeds. By a mortgage dated March 18, 1921, the hereditaments were conveyed by the plaintiff to the defendant by way of mortgage for securing the payment to the defendant of the principal sum of 1600*l.* with interest thereon at 6 per cent. per annum. The mortgage and other title deeds were handed over to the defendant. On November 2, 1921, the plaintiff duly paid to the defendant interest under the mortgage deed. That was the one and only payment of interest which the plaintiff ever made, and she made no acknowledgment of the debt until on July 17, 1936, she wrote a friendly letter to the defendant, in which she asked the defendant to return to her the title deeds of "Salwick" in order that she might lodge them in her bank as security for a loan. That letter was relied on as being an acknowledgment to take the case out of the Statutes of Limitations. The defendant did not reply to that letter, and after some correspondence between the solicitors of both parties the plaintiff issued the writ in

this action. The plaintiff claimed (inter alia) delivery to her of the mortgage and all other title deeds relating to the hereditaments in the possession or control of the defendant.

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Norman Daynes K.C. and *Hewins* for plaintiff. As between a mortgagor and a mortgagee, the mortgagee was given possession of the title deeds, because he had the fee simple under the old law: *Harrington v. Price*. (1) Now it depends on s. 85, sub-s. 1, of the Law of Property Act, 1925. In *Clayton v. Clayton* (2) Maugham J. held that absolute ownership of land did not necessarily carry with it the right to title deeds, but he pointed out that it was only in exceptional cases that it did not do so and that prima facie the absolute ownership of land did carry with it the right to title deeds. A squatter who acquired a legal title to land could sue the original owner of the land for the right to possession of the title deeds: *Crow v. Tyrrell*. (3) So long as a mortgagee has an interest in the land he is entitled to possession of the title deeds, but when his interest entirely ceases, as it has done here, the mortgagor becomes entitled to their possession. *In re Cooper* (4), where the mortgagees were ordered to give up possession of the title deeds, was a case of special hardship. Where the title deeds get into the hands of a third party, without the connivance of the legal mortgagee, the legal mortgagee can recover them: *Manners v. Mew*. (5)

R. C.-H. Horne (*Roger Turnbull* with him) for defendant. In order to succeed the plaintiff must not only show that she has the legal title, but she must show that she is entitled to recover the title deeds without paying the amount due on the mortgage. There is nothing in the Statutes of Limitations to vest the legal estate in the plaintiff. Even if the defendant is only a trustee the plaintiff is not entitled to the deeds, because she has not got the legal estate: Maugham J. in *Clayton v. Clayton*. (6) There is nothing in the Law of Property Act, 1925 (15 Geo. 5, c. 20), to affect the rights of

(1) (1832) 3 B. & Ad. 170.

(2) [1930] 2 Ch. 12.

(3) (1818) 3 Madd. 179.

(4) (1882) 20 Ch. D. 611.

(5) (1885) 29 Ch. D. 725.

(6) [1930] 2 Ch. 12, 19.

FARWELL J. the parties as to the possession of the deeds: Sch. I., Part VII., para. 7, ss. 13, 14. The defendant had the legal estate for the term and the plaintiff the reversionary interest. This is an action of detinue and title deeds can only be recovered by an action for redemption: *Bank of New South Wales v. O'Connor*. (1) There is nothing in the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), to prevent acknowledgment being given after the expiration of the statutory period; see ss. 14, 34: *Kibble v. Fairthorne*. (2) The letter of July 17, 1936, was such an acknowledgment. He also referred to *In re Atkinson's and Horsell's Contract* (3) and *Taylor v. Twinberrow*. (4)

Daynes K.C. in reply. In *Sanders v. Sanders* (5) the Court of Appeal held that no acknowledgment after the statutory period by the person who has acquired the statutory title can revive the old title. If a plaintiff can establish his legal title he can claim in equity his right to possession of the title deeds: *Crow v. Tyrrell*. (6) If the title deeds are not in the possession of the person who has the legal title, the road is open to frauds of various kinds. He also referred to *Newton v. Beck*. (7)

FARWELL J. This action raises an interesting question under somewhat unusual circumstances. It is not for me to make any comment on those circumstances. I am merely concerned to decide what are the rights of the parties in the matter.

[His Lordship dealt with some questions that it is not necessary to report, and continued:] The real question of difficulty in this case is as to the claim for delivery up of the title deeds. In my judgment, where a person is in sole possession of property with a title both beneficial and legal which is good against all the world, and indefeasible in law and in equity, prima facie that person is entitled to possession of the title deeds of that property.

(1) (1889) 14 App. Cas. 273.

(2) [1895] 1 Ch. 219.

(3) [1912] 2 Ch. 1.

(4) [1930] 2 K. B. 16.

(5) (1881) 19 Ch. D. 374, 379.

(6) 3 Madd. 179.

(7) (1858) 3 H. & N. 220.

No doubt there are cases in which the Court will not order delivery up of title deeds to a person who is the legal owner of the property. The whole matter was considered by Maugham J. in *Clayton v. Clayton* (1), and as his Lordship points out in that case the absolute ownership in the land does not necessarily carry the right to the title deeds. Although I entirely accept that as a correct statement of the law, in my judgment, it is true, as pointed out by Maugham J. himself, to say that although it does not necessarily follow that an absolute owner is entitled to the title deeds, *prima facie* he is so entitled. Maugham J. pointed out (2): "it is no doubt true that the immediate freeholder has both in law and in equity a *prima facie* title to the possession of the title deeds. He may maintain an action of detinue against any person who withholds them from him after demand made." Then he goes on to say: "It is going too far, however, to suggest that the fee simple owner has always a right to the title deeds, for it appears to be settled that he may, if he pleases, give them away. . . . By parity of reasoning he could no doubt destroy them." Then he deals with other cases. As I understand that judgment the learned Judge is saying that although there is a *prima facie* right in the absolute owner to have possession of the title deeds there are cases in which he may not be entitled to assert successfully that right. It appears that, before the Judicature Act, a claim in equity by the owner of property to recover title deeds could be made, but no claimant in equity could succeed in recovering title deeds unless he could show he was in undisputed possession of the property, and if that was a matter in dispute it was essential for him to establish his title to the property in a Court of law before he could maintain a claim in equity to the title deeds. That, as I understand it, is the effect of the case of *Crow v. Tyrrell*. (3) The learned Vice-Chancellor, Sir John Leach, in that case says (4): "An heir out of possession is entitled to a discovery of deeds necessary to support his legal title, or to have terms put out of his way

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(1) [1930] 2 Ch. 12.

(2) *Ibid.* 12, 18.

(3) 3 Madd. 179.

(4) *Ibid.* 181-2.

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which may impede his recovery at law ; but this bill, although the plaintiff is an heir out of possession, does not pray the aid of this Court in order that he may assert his legal title, but prays immediate relief, by the delivery of the possession of the estate and of the title deeds. It is not denied, that if this bill had prayed the delivery of the possession of the estate only, that the demurrer would hold ; because this Court cannot relieve upon a legal title. But it is said that the delivery of title deeds is equitable relief ; and that this Court, having in that respect jurisdiction, will do complete justice. The possession of the title deeds is incidental to the possession of the estate, but cannot be recovered with the estate at law. This Court, therefore, will give the title deeds to him who has at law recovered the possession of the estate ; but its jurisdiction in this respect is confined to the possessor of the estate. If this plaintiff recovers the estate at law, then, and not till then, he may come here for the possession of the title deeds. All the cases prove this." That case decides that although a Court of Equity could not entertain an action for possession of the property, if a legal title was once established the person having the legal title could file a Bill in Equity and could in those proceedings recover the title deeds, and the Vice-Chancellor appears to have taken the view that once possession is proved to the satisfaction of a Court of Equity the possessor is entitled to recover the title deeds by means of an equitable action. In the present case, therefore, I start with this, that *prima facie* a person who is in possession of land with an indefeasible title ought to be put into possession of the title deeds of that land. It is said on behalf of the defendant that no claim to recover the title deeds can succeed unless it is shown that the legal estate is in the claimant. In my judgment the legal estate is in this case in the person who is in possession of the property, that is the plaintiff. It is quite true that the effect of the Statutes of Limitations is not to convey any estate or interest from the person in whom it was originally to the trespasser or other the person who acquires a title by virtue of the Acts, but on the other hand the estate, whether it be

legal or equitable or both, of the original mortgagee or the original owner, is put an end to once and for all by these Statutes. That person no longer has any right to assert any title to the land either in law or in equity, his rights having wholly ceased, and the person in whom the land is vested, if he is in possession of the land with an indefeasible title, has acquired a legal estate which is good against all the world, and if it be necessary for the plaintiff in a case such as this to establish that he has the legal estate vested in him, in my judgment that has been shown in this case. But in any event the position is this. The plaintiff has satisfied me that she and she alone has any right of any sort or kind, legal or equitable, to the property in question, and prima facie she is, in my judgment, entitled to the title deeds.

Then it is said that there must be shown some reason why the defendant should not retain the title deeds and that in the absence of any such reason the Court will not grant the plaintiff the relief which she seeks. In my judgment, there is reason here why the order should be made for the delivery up of the title deeds. Under the circumstances I have some sympathy with the defendant and she is not unnaturally anxious to retain any rights which she properly has. But when I come to consider the position of affairs the reasons why I should order the title deeds to be delivered up to the plaintiff are not, I think, far to seek. The defendant, if I am right in the view which I take of the law, has not now and has for some time ceased to have any interest in this property at all; therefore the title deeds can be of no possible use to her and there is no reason at all why she should retain them as against the person who is the owner of the property. Further there is a reason, and a sound reason, why the defendant should not in a case of this kind be entitled to retain the title deeds. I am not suggesting in this case for one moment that so long as the title deeds remain in the hands of the defendant any wrong use will be made of them, but if the title deeds get into other hands it might be possible for the person into whose hands they come to use them for improper purposes and to perpetrate frauds on third parties.

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FARWELL J. That seems to me to be a real reason why in a case of this sort, where the plaintiff is the sole owner of the property, the title deeds should go to that person and should not be retained by any other person. In such a case as that before Maugham J. (1) there were special reasons why the title deeds should not be handed over. There are other cases where similar considerations may apply, but as I have pointed out there is in this case no reason why the defendant should retain the title deeds ; and there is a reason why she should not, and, in my judgment, under those circumstances, I ought to order the defendant to hand over to the plaintiff the whole of the title deeds relating to the property in question which are now in her possession. That being so and the plaintiff having succeeded in this action she is entitled to the costs of the action, and the counterclaim must be dismissed with costs.

Solicitors for plaintiff : *Willes, Gladstone & Reid Sharman.*

Solicitors for defendant : *Agar-Hutton, Butcher & Co.*

(1) [1930] 2 Ch. 12.

P. J. B.

Applied. DUDLEY AND DISTRICT
BENEFIT BLDG. SOC. v. EMERSON.
[1949] 1 All E.R. 691.

Dictum of FARWELL, J., at p. 317,
approved. DUDLEY & DISTRICT
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[1949] 2 All E.R. 252.

Considered. DUDLEY,
ETC. v. EMERSON.
[1949] Ch. 707

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TION, LIMITED v. UNION LAND AND HOUSE J.
INVESTORS, LIMITED. 1937
Jan. 20.

[1936. I. 1053.]

Mortgage—Covenant by mortgagors not to exercise the power of leasing conferred on them by the Law of Property Act, 1925, without the written consent of the mortgagees—Lease granted without consent of mortgagees—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41)—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 99, sub-ss. 1, 2, 8, 11, 13; s. 152, sub-ss. 1, 2, 6.

By a legal charge dated October 1, 1935, the defendants charged by way of legal mortgage certain freehold properties to the plaintiffs, and they covenanted with the plaintiffs that they would not, except with the previous written consent of the plaintiffs, exercise the power of leasing or agreeing to lease or of accepting surrenders of leases conferred by the Law of Property Act, 1925, on a mortgagor while in possession.

By a tenancy agreement dated October 8, 1935, the defendants granted a lease of part of certain premises included in the legal charge, from September 29, 1935, upon a yearly tenancy. The plaintiffs were not asked for and did not give their consent to the execution by the defendants of the tenancy agreement and no counterpart thereof had at any time been delivered to the plaintiffs in accordance with the requirements of s. 99, sub-s. 11, of the Law of Property Act, 1925:—

Held, that the defendants, in granting the lease of October 8, were not exercising their statutory power, and that consequently they did not commit any breach of the covenant contained in the legal charge of October 1.

WITNESS ACTION.

By a legal charge dated October 1, 1935, the defendants charged by way of legal mortgage certain freehold properties therein described with the payments to the plaintiffs on March 31, 1936, of the principal sum of 19,700*l.* with interest thereon as therein mentioned. By clause 5 (2) the defendants covenanted with the plaintiffs that they would not, except with the previous written consent of the plaintiffs, exercise the power of leasing or agreeing to lease or of accepting surrenders of leases conferred by the Law of Property Act, 1925, on a mortgagor while in possession. By clause 6 (1) the plaintiffs covenanted with the defendants that if on each

FARWELL half-yearly day thereby fixed for payment of interest and
 J. continuously during the period of ten years from the date
 1937 thereof or within thirty days next after each such day there
 IRON should be paid to the plaintiffs interest on the principal
 TRADES money thereby secured at the rate therein mentioned up to
 EMPLOYERS that half-yearly day and there should not be any breach of
 INSURANCE money thereby secured at the rate therein mentioned up to
 ASSOCIATION that half-yearly day and there should not be any breach of
 v. any obligation, statutory or otherwise, binding on the
 UNION LAND defendants or of any of the covenants whether express or
 AND implied therein contained and on the part of the defendants
 HOUSE to be observed and performed (other than and besides the
 INVESTORS. implied covenant for payment of the principal money and
 interest thereby secured) then (subject as therein provided)
 the plaintiffs would not before the expiration of ten years
 require payment of the principal money or any part thereof.
 By clause 6 (2) the defendants covenanted with the plaintiffs
 that (subject as therein provided) the whole of the principal
 money thereby secured should be allowed to remain on the
 security thereof during the period of ten years.

By a tenancy agreement dated October 8, 1935, the defendants demised part of certain premises (which premises were included in the legal charge of October 1, 1935) from September 29, 1935, upon a yearly tenancy at a rental of 65*l.* per annum. The plaintiffs were not asked for and did not give their consent to the execution by the defendants of the tenancy agreement and no counterpart thereof had at any time been delivered to the plaintiffs in accordance with the requirements of s. 99, sub-s. 11, of the Law of Property Act, 1925.

When the fact that the lease had been granted was brought to the notice of the plaintiffs they raised the question whether the granting of the lease was not a breach of the covenant contained in the charge, and they brought this action claiming: (1.) a declaration (*a*) that the execution by the defendants, without the previous written consent of the plaintiffs, of the tenancy agreement constituted a breach of the covenant in the legal charge; and (*b*) that the failure or neglect of the defendants to deliver to the plaintiffs within one month from October 8, 1935, a counterpart of the tenancy

agreement constituted a breach by the defendants of the statutory obligations imposed on them by s. 99, sub-s. II, of the Law of Property Act, 1925. The plaintiffs also asked for an injunction to restrain the defendants from granting any lease without their consent. It appeared from the defence that the tenants under the agreement of October 8, 1935, had surrendered their tenancy and vacated the premises on May 5, 1936.

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Vaisey K.C. and *R. C.-H. Horne* for plaintiffs. The position between a mortgagor and a mortgagee has been changed by the Conveyancing and Law of Property Act, 1881, and the Law of Property Act, 1925. Before the Act of 1881 in the case of a legal mortgage the mortgagor in possession had no power to grant a lease that was binding on the mortgagee. That Act gave the mortgagor in possession express power to grant leases on certain terms and certain conditions that were binding on the mortgagee. Sect. 99 of the Law of Property Act, 1925, gave the mortgagor in possession power to grant leases without the consent of the mortgagee, but under the covenant in the legal charge in this case the mortgagor cannot exercise his power without the written consent of the mortgagee. The form of the covenant is similar to that given in *Key and Elphinstone's* *Precedents in Conveyancing*, 13th ed., p. 65, cl. 2. Sect. 152 of the Law of Property Act, 1925, gives the lessee protection in the case of the grant of an invalid lease. The parties in this case deliberately refrained from excluding the statutory power, but it was only to be exercised with the written consent of the mortgagee. Apart from s. 99 of the Act of 1925 the mortgagor has no power of leasing and a lease can only be granted under the statutory power. If a mortgagee covenants with a mortgagor not to exercise his right to sell within a limited period and he sells the next day, the purchaser would get a perfectly good title although the mortgagee would have committed a clear breach of covenant. Here the lessees may have had a good lease, but the defendants have committed a breach of covenant.

FARWELL J. *Spens K.C.* and *Maurice Berkeley* for defendants. The mortgagor has more than the statutory powers of leasing. Before the Act of 1881 the mortgagor had no power to grant a lease that would be binding on the mortgagee without the consent of the mortgagee, but he could grant a lease that would be good against all the world except the mortgagee. Also there could be an express power of leasing given to the mortgagor in the mortgage deed. The Act of 1881 gave the mortgagor certain powers of leasing and the Act of 1925 strengthened those powers. In Coote on Mortgages, 9th ed., the question is dealt with at pp. 697 and 702. Where a mortgagee refuses to concur in a lease already granted the lessee is entitled to redeem the mortgage: *Tarn v. Turner*. (1) Where a lease is granted under statutory powers, the statutory provisions must be adhered to: *King v. Bird*. (2)

Vaisey K.C. replied.

FARWELL J. The question I have to determine is quite a short one and largely a matter of construction of a particular document, but it is not, in my view, a very easy question to answer.

The facts are not in dispute and no oral evidence has been called. The defendants are the owners of the equity of redemption in certain property comprised in a legal charge dated October 1, 1935. By that charge the defendants, who are called the borrowers, as beneficial owners, charge the lands comprised in the charge and certain other freehold premises to the plaintiffs, who are called the mortgagees. It provides that: "For the purpose of this charge (and without prejudice to any equitable right) the legal right of redemption ceases on March 31, 1936, when the statutory power of sale shall become exercisable." Then it provides: "The borrowers hereby covenant with the mortgagees that so long as any money remains due under this security the borrowers," will do certain things to which it is not necessary to refer until I come to clause 5 of the deed. That clause is in these terms so far as relevant [His Lordship read

(1) (1888) 39 Ch. D. 456.

(2) [1909] 1 K. B. 837.

clause 5 and continued:] Then the mortgagees covenant with the borrowers in clause 6 (1.) [His Lordship read clause 6 and continued:] That charge having been duly executed almost immediately afterwards, that is to say, on October 8, 1935, the defendants granted a lease of a certain office, a portion of the mortgaged property, to two persons at a rent of 65*l.* to hold from September 29, 1935, upon a yearly tenancy. The fact that that lease had been granted was unknown to the plaintiffs; their consent was never sought nor given to the granting of that lease and it only came to their notice when, on January 6 last year, the plaintiffs' solicitors wrote and asked the defendants to provide them with a statement in writing showing the under-lettings as on January 1, 1936. In answer to that the secretary to the defendant company informed the plaintiffs of the agreement for lease to which I have referred. On that they raised the question whether the granting of such a lease was not a breach of the covenant contained in the charge with the consequence that the provision as to the ten years during which the loan was to remain outstanding was no longer binding on the plaintiffs, and they commenced this action for the purpose of having determined by the Court the respective rights of the parties having regard to the facts which I have stated. In order to determine this question it is necessary to consider quite briefly the position between mortgagors and mortgagees before the passing of either the Act of 1925 or the Conveyancing Act, 1881. Under the law as it was before the Act of 1881 the position was this, that in the case of a legal mortgage the mortgagor, although in possession, had no power at all to grant a lease which was binding on the mortgagee. Any lease granted by him to some third party would be in no way binding on the mortgagee and as between the lessee and the mortgagee would create no estate or interest other than that which I will mention in a moment. So far as the mortgagor, who had granted the lease, was concerned, it was binding upon him as against the lessee, and he was estopped from disputing it and as against the mortgagor or against any one

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other than a person having a title paramount to the mortgagor, e.g., the mortgagee, such a lease was good and the lessee was entitled to the benefit conferred thereby, but so far as the mortgagee was concerned the lessee had no estate or interest as against him, except that he had a right to redeem in the event of the mortgagee taking steps to evict him from possession of the property which had been leased to him by the mortgagor, but beyond that right to redeem he had no rights as against the mortgagee nor had he any estate or interest as against the mortgagee in the land at all; he had by virtue of equity a right to redeem if he was in danger of being evicted by the mortgagee who had, as I have said, a paramount title, but except to that extent a lease granted by the mortgagor prior to the Act of 1881 was ineffective as against the mortgagee. That position was altered by the Conveyancing Act, 1881, because by that Act express power was given to the mortgagor in possession to grant leases on certain terms and subject to certain conditions which were good as against the mortgagee. The effect of that statutory power was to enable the mortgagor for the first time to do something which hitherto it had not been possible for him to do—namely, to grant a lease during the continuance of the charge which would be binding on the mortgagee. The fact that that power was given to the mortgagor did not, and as the law now stands does not, in my judgment, deprive the mortgagor of the power of doing that which he could have done apart from the Act—namely, grant a lease to a third party, which without the consent of the mortgagee is not binding on him, but is binding as between the lessor and the lessee. I cannot find that the power which the mortgagor had in that regard was taken away by the Act, which merely gave the mortgagor a wider power of granting leases on certain conditions which were binding on the mortgagee. The position, apart from the Act, in my judgment, remained the same. The mortgagee as soon as he ascertained that the mortgagor had granted a lease to a third party was entitled to take steps immediately to evict the tenant, to treat him as a trespasser, and, subject to the tenant's right

to redeem, the mortgagee could evict him and recover possession of the property. On the other hand, he might, if he desired, confirm what had been done, but if, knowing the facts, he stayed his hand and did nothing, he might find himself in danger of being held to have acquiesced in and thereby confirmed the lease and, therefore, not entitled to oust the tenant. These respective rights of the mortgagor and mortgagee with regard to a lease by the mortgagor were not, in my judgment, altered by the Conveyancing Act, but what the Conveyancing Act did was to make the position one which was more satisfactory as between the mortgagor and mortgagee by enabling the mortgagor, subject to the conditions and provisions of the Act itself, to grant a lease which was binding on the mortgagee, which theretofore he could not do. That, in my judgment, was the position, at any rate up to the coming into force of the Law of Property Act, 1925. The right of a tenant who was in under a lease granted by the mortgagor, which was not binding on the mortgagee, to redeem in certain circumstances, was in existence until 1925, and it existed by reason of the fact that the power of the mortgagor to grant such a lease was not affected by the Act of 1881. Then the question arises: Did the Act of 1925 alter that position? The section of the Act which I have to consider first is s. 99. Sect. 99, sub-s. 1, provides that "A mortgagor of land while in possession shall, as against every incumbrancer, have power to make from time to time any such lease of the mortgaged land, or any part thereof, as is by this section authorised." Then sub-s. 2 provides that: "A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have power to make from time to time any such lease as aforesaid." Then there follow provisions with regard to the length of leases which can be granted and the conditions upon which they can be granted, and sub-s. 8 provides as one of the conditions: "A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him,

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FARWELL be sufficient evidence." Then sub-s. 11 provides: "In case
 J. of a lease by the mortgagor, he shall, within one month after
 1937 making the lease, deliver to the mortgagee, or, where there
 IRON are more than one, to the mortgagee first in priority, a
 TRADES counterpart of the lease duly executed by the lessee, but
 EMPLOYERS the lessee shall not be concerned to see that this provision is
 INSURANCE complied with." That was not done here. Then sub-s. 13
 ASSOCIATION is of some importance: "This section applies only if and
 v. as far as a contrary intention is not expressed by the
 UNION LAND mortgagor and mortgagee in the mortgage deed, or otherwise
 AND in writing, and has effect subject to the terms of the mortgage
 HOUSE deed or of any such writing and to the provisions therein
 INVESTORS. contained." Sect. 99 is the section which regulates the rights
 as between the mortgagor and the mortgagee in connection
 with the granting of leases binding on the mortgagee. Sect. 152
 is the section which is intended to protect, so far as possible,
 persons who take leases of mortgaged property. The section
 begins: sub-s. 1: "Where in the intended exercise of any
 power of leasing, whether conferred by an Act of Parliament
 or any other instrument, a lease (in this section referred to
 as an invalid lease) is granted, which by reason of any failure to
 comply with the terms of the power is invalid, then—
 (a) as against the person entitled after the determination
 of the interest of the grantor to the reversion; or (b) as
 against any other person who, subject to any lease properly
 granted under the power, would have been entitled to the
 land comprised in the lease; the lease, if it was made in
 good faith, and the lessee has entered thereunder, shall take
 effect in equity as a contract for the grant, at the request of
 the lessee, of a valid lease under the power, of like effect as
 the invalid lease, subject to such variations as may be
 necessary in order to comply with the terms of the power."
 Then sub-s. 2 provides: "Where a lease granted in the
 intended exercise of such a power is invalid by reason of the
 grantor not having power to grant the lease at the date
 thereof, but the grantor's interest in the land comprised
 therein continues after the time when he might, in the
 exercise of the power, have properly granted a lease in the

like terms, the lease shall take effect as a valid lease in like manner as if it had been granted at that time." Lastly, sub-s. 6 is in these terms: "Where a valid power of leasing is vested in or may be exercised by a person who grants a lease which, by reason of the determination of the interest of the grantor or otherwise, cannot have effect and continuance according to the terms thereof independently of the power, the lease shall for the purposes of this section be deemed to have been granted in the intended exercise of the power although the power is not referred to in the lease." There is one fact which I omitted to state. The lease which was granted, and to which I have referred, has in fact been surrendered and the lessee is no longer in possession under the lease, but if it was a breach of covenant to grant that lease without the consent of the plaintiffs then there has been a breach of the covenant and the fact that there has since been a surrender cannot affect the rights of the parties. Moreover the parties, not unnaturally, are anxious to know what are their rights, apart altogether from the question as to whether there has been a breach of the covenant or not.

As I have said, the Conveyancing Act of 1881 did not in my judgment destroy any power which the mortgagor had to grant a lease which would not be binding on the mortgagee, although binding as between himself and the lessee, and I am unable to find anything in the Act of 1925 which has any such effect. It appears to me that the Act of 1925 did no more than the earlier Act in this regard, that it gave the mortgagor in possession a power, which he never had, apart from the Statute, to grant a lease which was binding on the mortgagee. I can find nothing to suggest that any power which he may have had apart from the Statute was taken away from him by that Act. Sect. 99 does not in terms state that the only power of granting leases is to be the statutory power and I can see nothing to suggest that it was intended to deprive the mortgagor of the power of granting a lease apart from the Statute, although that lease was not binding on the mortgagee. Bearing this in mind I turn now to consider the true construction of the relevant clauses in this

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particular document. By clause 5, which I will read once again, the defendants covenant with the plaintiffs that they "shall not except with the previous written consent of the mortgagees exercise the power of leasing or agreeing to lease or of accepting surrenders of leases conferred by the Law of Property Act 1925 on a mortgagor while in possession."

It is quite plain having regard to sub-s. 13 of s. 99 of the Act that the parties can agree as to any further terms in addition to the provisions and obligations imposed by the section itself. There is nothing to prevent the mortgagor and mortgagee agreeing that the statutory powers shall not be exercised or shall be exercised in a wider or less restricted manner than that provided by the Statute. In my judgment, the effect of inserting in the mortgage a covenant by the defendants that they will not, except with the consent in writing of the mortgagee, exercise the power of leasing given by the Statute is to impose a further and additional term on the obligations which are contained in the Act itself, and that the exercise or purported exercise of a power for which no previous consent has been obtained is not an exercise of the statutory power at all, because, as the result of the agreement made between the parties, the only power of leasing given by the Statute is the power of leasing with the consent of the mortgagee. If I read into the section an overriding obligation on the mortgagor to obtain the written consent of the plaintiffs, the effect must be that if there is no such written consent, then the power which otherwise would have been exercisable by the mortgagor has not been validly exercised. It is suggested that is not the true way of construing this document, and that properly construed the mortgagors have power to grant a lease under the Statute without the consent of the plaintiffs although by so doing they will commit a breach of one of the covenants in the mortgage with the consequential results following on such a breach, but I do not so read it. It is not perhaps very relevant, but it does occur to my mind that on the plaintiff's construction the position of the mortgagees might be unfortunate, because, notwithstanding the fact that they

were not prepared to permit the mortgagors to grant leases without their consent, they might find themselves bound by a lease granted by the mortgagors without their consent and with no remedy except such as flowed from a breach of covenant. On the other hand, if the true construction be that the mortgagors have no power to grant a lease under the Statute for which they have not previously obtained the written consent of the plaintiffs, then the plaintiffs cannot be bound. In my judgment, when the defendants granted the lease in question they were not granting a lease under the Statute at all, they were granting a lease which was in no way binding on the mortgagees, and the mortgagees, when they ascertained the existence of the lease, had their remedy open to them of taking such steps as they thought fit against the lessee. That they should have notice of such a lease at a reasonably early date is expressly provided for in the mortgage. Since the mortgagors are under an obligation, if required, to supply particulars of the lettings and although such a letting would not be a lease under the Act it would undoubtedly be a letting of which information would have to be given to the mortgagees if they so desired. If the true view is that when the defendants granted the lease they were not exercising the statutory power it must follow that by what they did they did not commit any breach of covenant. They had deprived themselves of the power of granting statutory leases without the written consent of the plaintiffs, and consequently when they granted this lease they were not exercising and could not have been exercising the power under the Statute and were only doing that which they could do apart from the Statute—namely, grant a lease which was not binding on the mortgagees.

Reliance was placed by the plaintiffs on s. 152, sub-s. 6, but, in my judgment, that sub-section does not assist them. That sub-section cannot create a power which did not otherwise exist, and if the lease in question could not, having regard to the terms of the charge itself, have been created under the powers given by the Statute, s. 152 cannot make it such a lease. The power of leasing, apart from the Statute, remains

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FARWELL and was exercised by the defendant in this case and so far
J. as the section is applicable at all in such a case the lessee is
1937 entitled as against his lessor to the benefit of it, but it does
IRON not enable him as against the mortgagee to say that, although
TRADES the power of leasing given by s. 99 was not exercisable at all,
EMPLOYERS the power of leasing given by s. 99 was not exercisable at all,
INSURANCE nevertheless it must be deemed to have been duly exercised
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v. so as to make the lease binding on the mortgagee. If, as
UNION LAND I think, the true view be that the defendants in granting
AND this lease were not and could not have been exercising the
HOUSE statutory power of leasing it must follow that this action
INVESTORS. cannot succeed because so long as the mortgagors have not
exercised their statutory powers without the consent of the
plaintiffs, they have not committed a breach of the covenant
contained in the charge ; but, as the mortgagors themselves
in their defence offer to undertake during the subsistence of
the charge to deliver to the plaintiffs a counterpart of any
lease or tenancy agreement granted by them, duly executed by
the lessee or tenant, within one month after the making thereof,
whether such lease or tenancy be made pursuant to the
power conferred by the Act or not, I think it is right that such
an undertaking should be embodied in the order and, subject
to that undertaking, the action will be dismissed with costs.

Solicitors for plaintiffs : *Leslie Field, Prior & Co.*

Solicitors for defendants : *Mead, Sons & Bingham.*

P. J. B.

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 Jan. 28, 29;
 Feb. 5.

Will—Accumulations—Direction to accumulate during lives of annuitants—Possibility of period of accumulation exceeding period permitted by law—Gift of residuary property, including accumulations, to charity—Right of charity to stop accumulations—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 164.

A testator, who died on January 1, 1925, by his will gave and devised all his property both real and personal to his trustees upon trust to pay out of the income thereof a large number of annuities, some being to certain religious institutions, and he directed that these last annuities should determine on the death of the last of the personal annuitants. He also gave certain legacies. He further directed that so long as any of the annuitants were alive the balance of the income of the residuary estate and the income resulting therefrom should be accumulated and invested, and subject as aforesaid he gave the whole of his property after the death of the last personal annuitant to the Congregational Union of England and Wales to be invested as capital. The secretary of that charity asked for an order that the trust for accumulation should be determined, and that either the surplus income in each year should be paid to the charity or that proper provision should be made for the payment of the legacies and annuities, and that subject thereto the residuary estate should be transferred to the charity:—

Held (affirming Bennett J.), that if any of the annuitants survived the period of twenty-one years from the testator's death, when the accumulations would cease by virtue of s. 164 of the Law of Property Act, 1925, the surplus income down to the death of the last surviving annuitant would be undisposed of and would pass as on an intestacy; and that the Court ought not to make the order asked for by the residuary legatees, as the effect of such an order would be to prejudice and possibly defeat altogether the possible interests of the persons taking under an intestacy, and the Court ought never to make such an order if the effect might be to prejudice any interest in any other persons, whether present or future, vested or contingent, without their consent.

In re Deloitte. Griffiths v. Deloitte [1926] Ch. 56 applied and followed.

APPEAL from a decision of Bennett J.

The testator, Charles Davey Blake, who died on January 1, 1925, made his will on September 14, 1920, and thereby appointed Charles Geen and Harry Geen to be his executors

C. A. and trustees. Charles Geen had since died, but Harry Geen was a defendant to the originating summons.

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By his will the testator, after disposing of certain specific property, gave and devised all his property both real and personal to his trustees upon trust to pay out of the income thereof a large number of annuities ; he divided the annuities into six groups and directed that they should be paid in the order and preference of those groups. The sixth group contained annuities to certain religious institutions, and the testator directed that those last annuities should determine on the death of the last of the personal annuitants.

On the death of the last of the personal annuitants the testator gave legacies to certain charitable objects, and, after declaring that the above mentioned legacies and annuities were given free of all death duties, he further directed that so long as any of the annuitants were alive the balance of the income of the residuary estate and the income resulting therefrom should be accumulated and invested, but that any deficiency in one year might be made up from the surplus income of any other year, and, subject as aforesaid, he gave the whole of his property after the death of the last personal annuitant to the Congregational Union of England and Wales to be invested as capital, but as regards one-half of the income thereof upon trust to pay the same to the Devon Congregational Union. Both the last mentioned charities were unincorporated bodies.

The personal estate of the testator at his death was valued at 338,000*l.* and his real estate at 22,000*l.*, making a total of 360,000*l.* Since the death of the testator certain of the annuitants had died, and the subsisting annuities at the present time amounted to 2275*l.* The income of the whole estate very greatly exceeded that sum, the surplus income at the present time being approximately 12,000*l.*

The Secretary of the Congregational Union of England and Wales, suing on behalf of that charity, took out an originating summons by which he asked that the trust for accumulation should be determined, and that either the surplus income in each year should be paid to the charity or that proper provision

should be made for payment of the legacies and annuities, and that subject thereto the residuary estate should be transferred to the charity.

Bennett J. made an order dated February 13, 1936, by which it was declared (1) that the gift in the will to the Congregational Union of England and Wales of the whole of the testator's property included the accumulations of income and the income resulting therefrom, but (2.) that the Congregational Union were not entitled to determine any further accumulations, and that in the event of any of the annuities continuing beyond January 1, 1946, the surplus income of the residuary estate and of the accumulations from that date until the cesser of the last annuity would be undisposed of and would devolve as on an intestacy.

The plaintiff appealed from the order so far as it declared that he was not entitled to have the accumulations determined.

F. K. Archer K.C. and *Wilfrid M. Hunt* for Sidney Malcolm Berry, the secretary of, and suing on behalf of, the Congregational Union of England and Wales. The testator by his will made a gift of the whole of his property after the death of the last annuitant to the residuary legatee. Bennett J. has held that the gift to the residuary legatee includes the accumulation of income; but the will can and should be so construed as to avoid an intestacy and, if so, the next of kin, who object to an order being made putting an end to the trust for accumulation, take no interest under the will; the only persons interested in the estate are the annuitants and the residuary legatees. The Accumulations Act, 1800 (Thellusson Act), has now been repealed and re-enacted by the Law of Property Act, 1925; s. 164 of that Act prohibits the accumulation of income for a longer period than twenty-one years from the death of the grantor. The only question is whether the residuary legatees or the next of kin are to get the benefit of the income beyond the period of twenty-one years. Of the former, when the trust to accumulate comes to an end there is nothing for the Act to strike at; the annuitants and the residuary legatees

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have the right to the whole of the property. Where there is a gift of residue subject to annuities the residuary legatee can always call for the fund subject to proper provision being made for the annuities. It was held in *Harbin v. Masterman* (1) that where an annuity is payable out of the residuary estate of a testator the Court has jurisdiction to set apart a sufficient sum to answer the annuity and to pay the remainder of the residue to the residuary legatees. That proposition is merely a particular instance of the general proposition that when all the parties interested ask for the estate the trustee must give it up. Where a testator bequeathed personal property to trustees upon trust to accumulate the income until B. attained the age of twenty-five years, and then to transfer the property and accumulation to B. upon attaining that age, B. on attaining twenty-one could call for a transfer to him of the property and accumulations—*Saunders v. Vautier*. (2)

The second proposition is that the rule laid down in the first proposition applies whether or not there be a direction to accumulate the income. If the trust for accumulation is for the benefit of the annuitants it comes to an end when the annuities are satisfied, but if it is not for the benefit of the annuitants then it must be for the benefit of the residuary legatees and the trust cannot prevent them calling for the estate. The next of kin have no right to the income during the period of accumulation as they have no interest under the will and they cannot have one created for them. If the next of kin take an interest in the meantime they take it not under the will but by operation of law. The next of kin have no equity to require the accumulation of income to be continued. Bennett J. was wrong in holding that because under the will of the testator the income of the property has to be accumulated until the death of the last annuitant who may live for more than twenty-one years after the death of the testator, that as from the end of twenty-one years from the death of the testator the income would be undisposed of and go to the next of kin. In *Harbin v. Masterman* (3) a

(1) [1896] 1 Ch. 351.

(3) (1871) L. R. 12 Eq. 559.

(2) (1841) 4 Beav. 115; Cr. & Ph. 240.

testator, who had no next of kin, bequeathed annuities and directed his trustees to accumulate the surplus income, and on the death of the last surviving annuitant to stand possessed of the fund and accumulations in trust for certain charities. It was held by Wickens V.-C. that after the annuities had been provided for the charities were entitled to the surplus funds and the accumulations, but were not entitled to have the accumulations stopped, and to be paid at once. But on the same case *Harbin v. Masterman* (1) coming on again more than twenty years later it was held by the Court of Appeal, affirming Stirling J., that the charities were entitled to have the accumulations stopped and to be paid the surplus income each year as it accrued. That decision was affirmed by the House of Lords sub nom. *Wharton v. Masterman*. (2)

There is no case which conflicts with the decision of the Court of Appeal in *Harbin v. Masterman* (3) that where an annuity is payable out of the residuary estate of a testator the Court has jurisdiction to set apart a sufficient sum to answer the annuity, and to pay the balance of the residue to the residuary legatees notwithstanding the opposition of the annuitant except *Weatherall v. Thornburgh* (4), where it was held that as to the surplus income which would accrue between the expiration of twenty-one years from the testator's death and the death of his widow there was an intestacy and that the residuary legatee was not entitled during the life of the widow to ask for payment of the accumulated funds, subject to provision being made for payment of the annuities and legacies. But in that case the accumulations were directed for the purpose of supporting not only the annuities but also the interests of other persons who were not residuary legatees. The authorities cited bear out the three propositions put forward on behalf of the appellant, and support the case of the appellant and are inconsistent with that of the respondent. The course proposed on behalf of the appellant does not injure any of the parties having an interest in the testator's estate under his will.

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(1) [1894] 2 Ch. 184.

(2) [1895] A. C. 186.

(3) [1896] 1 Ch. 351.

(4) (1878) 8 Ch. D. 261.

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The testator gave the annuities out of and limited them to his original residuary estate and directed that so long as any of the annuitants were alive the balance of the income of the residuary estate and the income resulting therefrom were to be accumulated and invested. There is therefore expressed in the will an intention to accumulate the surplus income of the estate. The will then goes on to provide that any deficiency on one year may be made up from the surplus income of any other year. If therefore there is a difficulty in paying the annuities out of the income of the estate in any one year that deficiency is to be carried forward to a future year. The testator has left the annuities to be paid out of the income of the existing residuary estate and not out of the accumulations of income resulting therefrom.

C. L. Fawell for the defendant Frederick John Cornish, representing the Devon Congregational Union. The mistake that Bennett J. made was that he assumed that there would be an intestacy during the period of accumulation, and then, relying on *In re Deloitte*. *Griffiths v. Deloitte* (1), he took the view that the Court should not alter the trust created by the will, because if that were done the next of kin would be defeated of their rights in case there was an intestacy by the stoppage of the accumulations. His judgment is inconsistent with itself because he says that there is a good gift of the residue to the Congregational Union of England and Wales, but he afterwards says that the income arising during the period of accumulation after the expiration of twenty-one years is not disposed of. In *Weatherall v. Thornburgh* (2) the party asking for payment of the accumulations was not the true residuary legatee, but a third party; but in the present case Bennett J. has held that there is a residuary legatee.

Fergus Morton K.C. and *A. J. Belsham* for the trustees of the Newton Abbot Congregational Church. The church is both an annuitant and a legatee, so it has conflicting interests. As an annuitant it does not agree with the proposed scheme for distribution; but it does not desire to take one side or the other.

(1) [1926] 1 Ch. 56.

(2) 8 Ch. D. 261.

Sir Gerald Hurst K.C. and *G. R. Upjohn* for the testator's widow. The contention that the annuities are charged only on the original fund and not on the accumulations of income is not correct. It is said that the provision in the will "that any deficiency in one year may be made up from the surplus income in any other year" means that the deficiency may be made up from the surplus income of any future year only. But under the will the testator gave the whole of his property "subject as aforesaid" and therefore the annuities are to be a charge upon the corpus and accumulations—*In re Howarth*. *Howarth v. Makinson* (1); *In re Watkins' Settlement*. *Wills v. Spence*. (2) It is sufficient to resist the claim to put an end to the accumulations to show that there are some persons interested in the accumulation other than the residuary legatees. It was held in *Weatherall v. Thornburgh* (3) that there was an intestacy as to the surplus rents and income which would accrue between the expiration of twenty-one years from the testator's death and the death of his widow. There the fund and accumulations were made a security for the payment of certain legacies on the happening of the given event, and the persons claiming were, therefore, only entitled to an undetermined and uncertain surplus (if any) which might be left of the fund after payment of the legacies. It was also held in that case that accumulations which failed under the Thellusson Act did not accrue for the benefit of the persons entitled in remainder but that there was an intestacy with regard to such accumulations. That decision is directly in point in the present case. It was held by the Court of Appeal in *In re Travis*. *Frost v. Greatorex* (4) that *Weatherall v. Thornburgh* (3) was not inconsistent with and had not been overruled by *Wharton v. Masterman*. (5) In *Wharton v. Masterman* (5) the annuitants had no interest in the surplus income and therefore there was no direction to accumulate except for the benefit of the persons who were to become ultimately entitled, and the principle of *Saunders v. Vautier* (6)

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(1) [1909] 2 Ch. 19.

(2) [1911] 1 Ch. 1.

(3) 8 Ch. D. 261.

(4) [1900] 2 Ch. 541.

(5) [1895] A. C. 186.

(6) 4 Beav. 115; Cr. & Ph. 240.

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therefore applied. It is clear that the next of kin in the present case would be seriously prejudiced if the order asked for was made.

[He was stopped.]

Charles Harman K.C. and *A. C. Nesbitt*, for Ruby James and Muriel Pearl Bloomer, the heir at law and next of kin, adopted Sir Gerald Hurst's argument.

A. P. Vanneck for Harry Geen, the executor.

Andrewes-Uthwatt for the Attorney-General.

Archer K.C. replied.

Cur. adv. vult.

1937, Feb. 5. FARWELL J. read the judgment of the Court (consisting of Slessor and Scott L.JJ. and Farwell J.), in which he stated the facts substantially as set out above and continued :—

In these circumstances the residuary legatees, not unnaturally, desire that the trust for accumulation should be put an end to, and that either the surplus income in each year should be paid to them, or that proper provision should be made for payment of the legacies and annuities, and that, subject thereto, the residuary estate should be transferred to them ; and it was for the purpose of having it decided whether they are so entitled that this originating summons was taken out.

The matter came before Bennett J., and, by an order dated February 13, 1936, it was declared (1.) that the gift in the will to the appellant of the whole of the testator's property included the accumulations of income and the income resulting therefrom, but (2.) that the appellant was not entitled to determine any future accumulations, and that in the event of any of the annuities continuing beyond January 1, 1946, the surplus income of the residuary estate and of the accumulations from that date until the cesser of the last annuity would be undisposed of and devolve as on an intestacy.

The plaintiff appeals from that order so far as it declares that he is not entitled to have the accumulations determined. There is no appeal from the first declaration in the order.

In order to determine whether the second declaration made

by the learned judge is right, it is necessary first to decide, as a matter of construction, what the rights of the annuitants are. *Prima facie*, where residue is given subject to annuities, the annuities are charged on the whole of the residue ; but it is argued that in this case this is not the true construction, and that the direction in the will that any deficiency in income in one year may be made up from the surplus income of any other year, means that the deficiency can only be made up out of the income of any future year, and that on this construction this case does not come within the general rule. In our judgment this contention is not well founded. We see no reason for construing the words " the income in any one year " as confined to the income of any future year, and that accordingly on the true construction of this will the annuitants have a charge on the whole of the testator's residuary estate.

Further, in our judgment the learned judge was right in declaring that if any of the annuitants survive the period of twenty-one years from the testator's death, when the accumulations will cease by virtue of s. 164 of the Law of Property Act, 1925, down to the death of the last surviving annuitant, the surplus income will be undisposed of and pass as on an intestacy.

The present position, therefore, is that the only persons presently interested in the residuary estate of the testator are the annuitants, the pecuniary legatees, and the residuary legatees, but that in certain circumstances the heir at law and next of kin of the testator may become entitled to the enjoyment of the surplus income for a limited period. In those circumstances are the residuary legatees entitled to the relief which they seek ?

It is now well settled that where a person is, or a number of persons collectively are, given property absolutely, but the date of enjoyment is postponed, if the persons so entitled are all *sui juris* and consent, the direction postponing payment is inoperative and of no effect, on the ground that the attempt to restrict the enjoyment of property given absolutely to persons who are *sui juris* is repugnant to the absolute gift.

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C. A. The leading authority for this is the well-known case of
 1937 *Saunders v. Vautier*. (1) It must, however, be remembered
 BLAKE, that that rule has no operation unless all the persons who
In re. have or may have any interest whatsoever in the subject-
 BERRY matter of the gift are sui juris and consent, and that unless
v. these conditions are fulfilled there is no legal right in the
 GEEN. ultimate beneficiaries to immediate enjoyment, and the
 Farwell J. conditions annexed to the gift must be complied with: see
Wharton v. Masterman. (2)

In certain circumstances, however, the Court of Chancery in the administration of an estate or the execution of a trust will permit the ultimate beneficiaries to have immediate enjoyment of the property given to them notwithstanding that there are other persons having an interest in the property who object. For instance, when the residuary estate is given absolutely to a person who is sui juris but charged with annuities, in such a case the Court may, if it thinks fit, make an order giving the residuary legatee immediate possession of the residue: see *Harbin v. Masterman* (3), per Lindley L.J.

The Court, however, will never make such an order unless it is satisfied that all persons having any interest in the property consent, or, if they do not consent, that their interests are amply and fully protected. The persons seeking immediate enjoyment in such a case have no legal right to it, and it is a matter for the Court in each case to consider whether the order can properly be made.

In the present case the appellant has no legal right to the order which he seeks, because, apart from any question of the heir at law and next of kin, the annuitants, who have an immediate interest in the residue, are objecting. There being no legal right in the residuary legatees to possession, is this a case where the Court ought to make the order?

The answer to that question must in our judgment be in the negative. The effect of any such order would be to prejudice and possibly defeat altogether the possible interests of the persons taking under an intestacy. Those persons do

(1) 4 Beav. 115; Cr. & Ph. 240.

(3) [1896] 1 Ch. 361.

(2) [1895] A. C. 186.

not take directly under the will, but as a result of its provisions and the operation of law they may become entitled to the enjoyment of a part of the income of the estate, and there are no means of preventing the possibility of those interests being prejudiced except by refusing to make the order.

In those circumstances it is in our judgment impossible to make any such order as the appellant seeks. It is true that the persons entitled on an intestacy may never become entitled to the enjoyment of any part of the property, but in our judgment the Court ought never to make such an order if the effect may be to prejudice any interest in any other person, whether present or future, vested or contingent, without the consent of such persons.

The case of *In re Deloitte* (1), on which the learned judge relied in the Court below, is a good example of this principle. In that case all the persons presently interested desired to obtain immediate enjoyment of the property, but, although the possibility of any other person ever coming into existence who would be entitled to participate was extremely remote, Tomlin J. refused the order.

The present case is in some respects a stronger one than that, because the possibility of the heir at law and next of kin becoming entitled to receive a part of the income of the estate is by no means very remote. Moreover, there is a further difficulty in the way of the appellant here which was not present in that case. Here the residue is given to the Congregational Union of England and Wales on charitable trusts and it has no power to vary those trusts by treating as income that which by the trust is to be capital or vice versa. The order sought would have that effect and that alone is sufficient to disentitle the appellant to the order unless and until the necessary variation of the trust has been duly sanctioned.

For these reasons in our judgment the learned judge came to the right conclusion in this matter. We think, however, that there should be a slight alteration in the form of the order which he made. In the order there is inserted after the

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declaration a paragraph beginning with the words "This Court does not think fit" and ending with the words "to exclude any intestacy." (1) These words appear to us to be unnecessary and possibly open to objection and all parties are agreed that it would be better that they should be deleted. The order will therefore be varied by deleting those words. Subject to that variation, the order made by the learned judge will be affirmed and the appeal dismissed.

Appeal dismissed.

Solicitors : *Shepheards, Walters & Bingley ; Church, Rendell, Bird & Co., for Woollcombe, Watts & Scrivener, Newton Abbot ; White & Leonard and Nicholls & Co., for W. Rackwood Cocks, Exeter ; H. W. Guthrie & Co. ; The Treasury Solicitor.*

(1) "And this Court does not think fit now to determine and leaves open the question whether the Congregational Union of England and Wales in conjunction with or with the concurrence of all other persons or bodies who

may be interested under the trusts of the testator's will in any accumulations of income are or will be entitled to determine any further accumulations of income and to exclude any intestacy."

R. F. S.

In re X. Y. (1)

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Lunacy—Percentage—Person domiciled out of England residing in mental home in England—Whether percentage to be based on total income or only on sums transmitted to this country—"Residing out of England"—Whether volition of patient essential to residence—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 148—Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27, sub-s. 3—Patients' Estates Rules, 1934, s. 148.

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In 1934 the patient, who was domiciled in a British dominion and temporarily resident in England for educational purposes, left for a short visit to America. Whilst there he became mentally deranged and was declared mentally and legally insane. He was sent back to this country as being a British subject, where on October 26, 1934, he was certified as a person of unsound mind. On June 21, 1935, a receiver of his property was appointed for a period of twelve months. At the expiration of that period the patient left the mental home where he had been residing and in July, 1936, he was formally discharged. In December, 1936, the receiver was discharged. In June, 1936, whilst the receiver was administering the affairs of the patient an account was sent in by him and on that account the percentage payable under the Lunacy Acts and Rules was assessed at 1000*l.* based on the patient's total income from his dominion property, which amounted to over 33,000*l.* a year. The receiver appealed from the assessment, but the Master in Lunacy affirmed it. On appeal from the Master the receiver contended that the patient, having been brought back to this country from U.S.A. without being able to exercise any volition in the matter of his residence, must be deemed not to be resident in England within the proviso to sub-s. 3 of s. 27 of the Lunacy Act, 1891:—

Held, that "residence" was a term which could be applied to a lunatic and that it could not be said that he was incapable of residing because he was incapable of the necessary volition, and that the patient did not therefore come within the proviso to sub-s. 3 of s. 27 of the Act of 1891 as being "a person residing out of England."

Observations of Salter J. in *Berkshire County Council v. Reading Borough Council* [1921] 2 K. B. 787, 798 approved and applied.

Held, therefore (affirming the Master's decision), that the case fell within r. 148, sub-r. 2, of the Patients' Estates Rules, 1934, and that the appropriate percentage fee had been charged.

APPEAL by the receiver on behalf of a patient against an order of the Master in Lunacy assessing the amount of percentage.

The following statement of the facts is taken from the

(1) Heard in camera, but reported by permission of the Master of the Rolls.

C. A. judgment of the Master of the Rolls: The patient, who
1937 was domiciled in a British dominion in October, 1934, whilst
X. Y., staying in America succumbed to mental illness and was
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England as a British subject, and on arrival in England was
certified as a person of unsound mind.

On June 21, 1935, a receiver was appointed in this country and continued to administer the estate, so far as necessary in this country, for a period of twelve months. On the expiration of that period the patient left the mental home where he was staying and was formally discharged on July 31, 1936. In December, 1936, the receiver was discharged and the patient was restored to the management of his affairs. Meantime, in June, 1936, whilst the receiver was administering the affairs of the patient, an account was sent in by him and on that account the percentage payable under the Act and the Rules was assessed at 1000*l.*, that being the maximum figure chargeable as a fee for the receiver's administration in this country, and it was based on the patient's total income, which was an income from dominion property amounting to something over 33,000*l.* a year.

Vaisey K.C. and *W. H. Gattie* for the appellant. The rule now governing the assessment of percentage is r. 148 of the Patients' Estates Rules, 1934. The material part of that rule provides that in the case of a patient not so found by inquisition a percentage of 3 per cent. shall be payable "on the clear annual income" of the patient with a maximum percentage in any one year of 1000*l.* This rule is made pursuant to s. 148 of the Lunacy Act, 1890. By a proviso to s. 27, sub-s. 3, of the Lunacy Act, 1891, it is provided that "in the case of persons residing out of England and declared lunatic according to the laws of their place of residence no percentage shall be levied except upon income arising from property within the jurisdiction of the judge in Lunacy and administered under his jurisdiction."

On behalf of the appellant it is submitted: (1.) That by the terms of the order appointing the appellant receiver his

powers were limited solely to the receipt of income arising from property in England and the receipt of money from time to time remitted to him by the curators in South Africa.

(2.) That the Court has no jurisdiction over the curators or over the property of the patient in South Africa, or the income arising therefrom, and that this property is not being administered under the Court's directions. (3.) That having regard to the facts of the case the patient ought to be deemed to be residing out of England for the purposes of s. 27, sub-s. 3, of the Lunacy Act, 1891.

On this last point, which is the material one, it is submitted that during the relevant year the patient was not residing in England except in the sense that he was physically residing. His home was in South Africa. He was either residing in New York, from which he was brought to this country, or in Southern Rhodesia. He was certainly on the facts not residing in this country.

Berkshire County Council v. Reading Borough Council (1) is not applicable to a case like the present.

The patient could only be called upon to pay percentage on the actual amount of his income which arose from his property in this country or which was remitted here from his property in South Africa.

Sir Terence O'Connor S.-G. and *Andrewes-Uthwatt* for the Crown. As regards the amount of the percentage the Master has found that the patient was being maintained at the rate of 400*l.* a month, which shows that large sums were passing through the receiver's hands.

As regards the proviso to s. 27, sub-s. 3, of the Lunacy Act, 1891, on which the appellant relies, this is not a case in which the patient has been found a lunatic in his own place of residence. The proviso does not therefore apply to this case.

Vaisey K.C. in reply. The patient is being asked to pay percentage twice over on the whole of his income, once in Southern Rhodesia and again in this country.

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C. A. LORD WRIGHT M.R. stated the facts as above set out and continued : Mr. Vaisey has contended that the proper charge is something like 88*l.*, because that is 3 per cent. on the sum of 2910*l.* which is the total amount which came under the control of the receiver and was used in this country for the maintenance of the patient during the year in question.

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The money which was used by the receiver for the maintenance of the patient was a sum of 2910*l.* That was in excess of the 490*l.* 6*s.* 8*d.*, the net income from certain securities which the patient before his illness had sent over to a Canadian bank for his use during his temporary stay in America. That income proved to be insufficient because the total expenditure was 2910*l.*, and the difference was made up by the realization by the receiver of some portion of the securities transferred to Canada, as I have stated. Under those circumstances, Mr. Vaisey has contended that, according to the Act and the rules, the sum of 1000*l.* was not the appropriate percentage fee.

The matter depends on s. 148 of the Lunacy Act, 1890, which provides that : " The Lord Chancellor, with the concurrence of the Treasury, may make rules fixing the percentage and fees payable in proceedings relating to lunatics and their estates, and regulating the mode in which the same are to be ascertained and paid." The rule made under that section is r. 148 of the Patients' Estates Rules, 1934, which provides : "(1.) Subject to the provisions of rules 149 and 150 the following percentages shall be payable on the clear annual income of a patient including any income applied for his benefit under a discretionary trust : (a) Where a patient is so found by inquisition, a percentage of 4 per centum per annum. (b) In all other cases a percentage of 3 per centum." Then sub-r. 2 provides : " The maximum percentage payable in any case in respect of any one year shall be 1000*l.*" This patient was not so found by inquisition ; he was certified as a lunatic according to the law of England and was so treated. Therefore this is a case in which there is chargeable a percentage of 3 per cent. per annum, subject to the maximum, and it is on the precise words of this rule that the Crown make their claim.

The facts which I have stated seem to me beyond any question to bring the matter within this rule and to justify the Crown's claim, unless some other relevant circumstances can be adduced by Mr. Vaisey to lead to a contrary conclusion. What he relies on for that purpose is s. 27, sub-s. 3, of the Lunacy Act, 1891, which is in these terms: "The power conferred by section 148 of the principal Act to make rules fixing percentage and fees shall be deemed to extend to all proceedings under the principal Act or this Act, whether relating to lunatics so found by inquisition or to any other person in relation to whom or to whose property an order under the said Acts has been or may be made. Provided that in the case of lunatics under the protection of the judge in Lunacy by virtue of the transmission of the record of an inquisition from Ireland and its entry of record in the High Court, and in the case of persons residing out of England and declared lunatic according to the laws of their place of residence, no percentage shall be levied except upon income arising from property within the jurisdiction of the judge in Lunacy and administered under his direction." It is on that sub-section that Mr. Vaisey bases his argument; but it is a necessary condition for the application of this limb of the proviso that the person should be residing out of England and declared lunatic according to the laws of his place of residence. In my judgment neither of these conditions is fulfilled in the present case. For the purposes of this sub-section, I think that at the material time the patient was not a person residing out of England; he was residing in England within the meaning of the word "residing" as used in these Acts. It is said that he, having been brought here from New York while of unsound mind and without any volition of his own, cannot be said to be residing here, even though it appears that at an earlier period he had voluntarily made his home here for a substantial time. In my opinion, however, the word "residence," as used in this Act, must mean residence in fact, even though the resident in question is, having regard to his state of mind, not capable of the volition which is generally considered as being essential to residence.

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There are some words in the judgment of Salter J. in *Berkshire County Council v. Reading Borough Council* (1), which seem to me to be singularly apt. He is there dealing with a case of a pauper lunatic and a settlement and he says (2) : “ As to the point that volition is necessary to residence under the Act ”—that is the Mental Deficiency Act, 1913—“ and that a mentally defective person is incapable of volition, it may well be that questions of difficulty and importance might arise whether, and how far, volition is necessary for residence ; but it is, to my mind, clear that defectives are capable of residing within the meaning of this Act, and it therefore follows either that volition is not essential to residing under this Act, or that persons mentally defective are capable of such volition as is essential to such residing.” I agree with that way of putting the matter. I may point out, in further confirmation of the view that lunatics are to be treated as capable of residing, s. 286 of the Lunacy Act, 1890, which deals with pauper lunatics and in sub-s. 2 provides : “ Every pauper lunatic who is chargeable to a union shall, while he resides in an institution for lunatics, be deemed for the purposes of his settlement to be resident in the union to which he is chargeable.” It says clearly that residence is a term which can be applied to a lunatic and it cannot be said that he is incapable of residing because he is incapable of the necessary volition. I think, therefore, that the patient here was not a person residing out of England, and I further think that he was not a person “ declared lunatic according to the laws of his place of residence ” within the meaning of the proviso. As I have already said, although a curator bonis has been appointed in Rhodesia, there is no evidence that that constituted a declaration of his lunacy by the Rhodesian law. It appears that the curator bonis was appointed on the fact that the patient had been certified in this country, and I do not think that, on any view, this comes within the proviso. The purpose of the proviso is partly illustrated by the first words which I have read. It deals with a case where a lunatic has been so found

(1) [1921] 2 K. B. 787.

(2) Ibid. 798.

or declared in Ireland, and where his property, or the bulk of his property, is being administered in Ireland, and where the record of the inquisition in Ireland has been made a matter of record of this Court. It may be that a similar illustration is to be found in the case of a person found to be a lunatic in India, where a record of the Indian proceedings may be transmitted to the officials in Lunacy here, and steps may be taken here under those proceedings to deal with the property in England. Those are quite different cases in their circumstances from what is found in the present case.

I think that the order of the Master was right and should be affirmed and this appeal dismissed.

ROMER L.J. I agree.

SCOTT L.J. I agree.

Appeal dismissed.

Solicitors for appellant : *Slaughter & May.*

Solicitor for Crown : *Treasury Solicitor.*

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[1936. D. 1654.]

Land—Compulsory purchase—Public Authority—Notice to treat—Compensation—Method of computation—Lands Clauses Acts—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), s. 1, sub-s. 1; s. 7, sub-s. 1—London Electric Metropolitan District and Central London Railway Companies (Works) Act, 1931 (21 & 22 Geo. 5, c. cxii.), ss. 3, 27, 50, 54—London Passenger Transport Act, 1933 (23 Geo. 5, c. 14), s. 5, sub-s. 4 (b)—London Passenger Transport Act, 1934 (24 & 25 Geo. 5, c. xcvi.), s. 68.

The plaintiffs were the estate owners in fee simple of certain land and buildings in the City of London. The defendants, a public authority established in accordance with the provisions of the London Passenger Transport Act, 1933, in October, 1935, gave notice to the plaintiffs to treat for the compulsory purchase of the premises, and subsequently took possession.

By the Act of 1933 certain passenger transport undertakings were transferred to the defendants including the C. L. Railway. It was provided by the Act that such transfer should include all lands and other property, assets, powers, rights and privileges held or enjoyed therewith, and further that the defendants might exercise all the rights, powers and privileges which immediately before the appointed day (July 1, 1933) were vested in the C. L. Railway as one of the undertakers and should be subject to all liabilities and obligations to which the C. L. Railway were subject immediately before the appointed day. Among the powers conferred on the C. L. Railway in existence on July 1, 1933, was a power conferred by an Act of 1931 to purchase the premises of the plaintiffs. The time for the exercise of this power was—after the passing of the Act of 1933—extended to October, 1937, by s. 68 of the London Passenger Transport Act, 1934.

The defendants contended that being a public authority authorized to acquire the particular land in question compulsorily, the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, as to the compensation payable, applied.

The plaintiffs denied this on the ground (a) that if the C. L. Railway (the "undertakers") had purchased compulsorily before July 1, 1933, the purchase price must have been fixed as provided for by the Lands Clauses Acts as modified by the Act of 1931, and that this was therefore a liability or obligation of the C. L. Railway to the plaintiffs; (b) that by virtue of s. 68

of the Act of 1934, the time limited for the exercise of compulsory purchase by the Act of 1931 was extended subject to the provisions for the protection or benefit of (inter alia) any company, body or person mentioned in (among others) the Act of 1931, and that the provisions of that Act with regard to the assessment of compensation in cases of compulsory purchase were provisions for the plaintiffs' benefit, and (c) that the provisions of the Act of 1931 were not affected by the provisions of the Acts of 1933 and 1934 in the absence of clear words showing that it was the intention of the two later Acts to abrogate the provisions of the Act of 1931:—

Held, that the plaintiffs' contentions failed because (a) as the C. L. Railway had not served any notice to treat on or before July 1, 1933, there was no liability or obligation of the C. L. Railway on that date towards the plaintiffs or their property to which the defendants could be subjected in respect of a notice given by the defendants subsequently to July 1, 1933, (b) the plaintiffs were not expressly mentioned as a company, body or person for whose protection or benefit provision was made in the Act of 1931, and (c) the provisions for compensation in the Act of 1931 were general provisions and accordingly the maximum "generalia specialibus non derogant" did not apply.

The compensation must therefore be ascertained under and in accordance with the Act of 1919.

Blackpool Corporation v. Starr Estate Co., Ltd. [1922] 1 A. C. 27 distinguished.

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ACTION.

The plaintiffs were the estate owners in fee simple of Nos. 2 and 3 Cheapside, in the City of London. The defendants, in exercise of their statutory powers, on October 2, 1935, gave to the plaintiffs a notice to treat stating that they intended to purchase and take these premises and were willing to treat with the plaintiffs for the purchase thereof. On October 14, 1935, the defendants gave a further notice to the plaintiffs stating that they would after the expiration of fourteen days from the service of the notice enter on and take possession of Nos. 2 and 3 Cheapside, and in due course, in pursuance of these notices, they entered on and took possession of the premises.

The compensation to be paid to the plaintiffs by the defendants was not fixed because a controversy arose with regard to the method by which it was to be determined. The plaintiffs contended that the compensation should be ascertained in accordance with the provisions of the Lands

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Clauses Acts, as modified by the London Electric Metropolitan District and Central London Railway Companies (Works) Act, 1931. The defendants, on the other hand, contended that the compensation ought to be ascertained in accordance with and by virtue of the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919.

Fergus Morton K.C. and *G. P. Slade* for the plaintiffs. The question before the Court depends on the construction of the statutory enactments affecting the defendants. Their Act of 1933, s. 5, sub-s. 4 (b), is strongly relied on. (1) It is submitted that the "undertakers" (namely, the Central London Railway), if they had purchased before July 1, 1933 (the appointed day), must have had the purchase price assessed under the Act of 1931, and this was an obligation towards the plaintiffs. Further, s. 68 of the London Passenger Transport Act, 1934, and the Act of 1931 is also relied on: see also *Blackpool Corporation v. Starr Estate Co.* (2)

The plaintiffs' argument is very fully stated in the judgment of the learned judge.

Tyldesley Jones K.C. and *J. Ramsay Willis* for the defendants. The provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, on the question of the purchase price payable for this particular property apply here. The defendants are a public authority and have power to acquire land compulsorily, and they have served a proper notice to treat. They therefore come directly within the Act of 1919.

Morton K.C. in reply.

LUXMOORE J. There is no dispute of fact. The defendants,

(1) London Passenger Transport Act, 1933, s. 5, sub-s. 4 (b): "Subject to the provisions of this Act, the Board, on the transfer of any undertaking specified in Parts I., II., III. or VI. of the Second Schedule to this Act—

(a)

(b) shall, to the exclusion of

the undertakers, be subject to all liabilities and obligations, whether arising by statute or otherwise howsoever, to which the undertakers were subject immediately before the appointed day in respect of the undertaking."

(2) [1922] 1 A. C. 27.

on October 2, 1935, gave a notice to treat under the LUXMOORE J.
 London Passenger Transport Act, 1933, to which I will
 refer as the Act of 1933. This Act, by s. 1, established
 the defendants as a public authority, one of the objects
 of the Act being to transfer to the defendants a number
 of passenger transport undertakings in an area defined
 in the Act as the London Passenger Transport area. The
 undertaking of the Central London Railway Company was
 one of the undertakings vested in the defendants by the Act
 (see s. 5, sub-s. 1, and the Second Schedule of the Act). By
 s. 5, sub-s. 2 (*a*), it is provided that the transfer effected by that
 section should extend to the whole of the undertaking
 transferred "including all lands, works and other property,
 assets, powers, rights and privileges held or enjoyed in con-
 nection therewith. . . ." Sub-s. 4 of the same section
 provided that the defendants might exercise and enforce all
 the rights, powers and privileges which were immediately
 before the appointed day vested in the Central London
 Railway Company as one of the undertakers referred to in
 respect of their undertaking. By s. 107 the "appointed day"
 is defined in the case of the Central London Railway Company
 as being July 1, 1933. Among the powers conferred on the
 Central London Railway Company in existence on July 1,
 1933, was a power to enter upon, take and use certain lands
 which included Nos. 2 and 3 Cheapside. This power was
 conferred on it by s. 27 of London Electric Metropolitan,
 etc., Act, 1931. The time for its exercise was limited by
 the Act of 1931 to October 31, 1934, but after the
 passing of the Act of 1933, this was extended to October 31,
 1937, by s. 68 of the London Passenger Transport Act, 1934.

The defendants' contention is that they are a public
 authority authorized at the date of the notice to treat to
 acquire land, including Nos. 2 and 3 Cheapside, compulsorily,
 and that therefore the provisions of the Acquisition of Land
 (Assessment of Compensation) Act, 1919, apply to the
 acquisition of the particular property. The Act of 1919,
 which is described in its title as "An Act to amend the law
 as to the Assessment of Compensation in respect of Land

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acquired compulsorily for public purposes and the costs in proceedings thereon," provides by s. 1, sub-s. 1: "Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by"—and then I am reading the section so far as it applies to this case—"any . . . public authority, any question of disputed compensation, . . . shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected, . . ." as therein mentioned. Sect. 7, sub-s. 1, provides: "The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those powers shall cease to have or shall not have, effect." Pausing there it would appear that the defendants have brought themselves within the provisions of the Act of 1919. They are authorized to acquire Nos. 2 and 3 Cheapside compulsorily, they have served a notice to treat, and they are admittedly a public authority.

The plaintiffs argue that the Act of 1919 does not apply, and they base their argument on three separate grounds. The first ground on which they rely is based on the provisions of s. 5, sub-s. 4 (b), of the Act of 1933. That sub-section provides that the defendants: "shall, to the exclusion of the undertakers," (i.e. the Central London Railway Company) "be subject to all liabilities and obligations, whether arising by statute or otherwise howsoever, to which the undertakers were subject immediately before the appointed day in respect of the undertaking." They say that immediately before the appointed day (July 1, 1933) the Central London Railway Company, if they had purchased the plaintiffs' property compulsorily, could only have done so on the terms that the purchase price should be ascertained and fixed as provided by the Lands Clauses Acts as modified by the Act of 1931 and that this was a liability or obligation of the Central London Railway Company towards the plaintiffs. I think that the fallacy of this argument becomes manifest

when it is realized that the Central London Railway Company had not at that date served any notice to treat, and therefore there was no liability or obligation of the Central London Railway Company towards the plaintiffs or their property to which the defendants could be subjected. It is, I think, impossible to construe the words "liabilities and obligations" in this sub-section as including a particular method of assessing compensation if a notice to treat should subsequently be served, not by the Central London Railway Company but by the defendants, because in no sense would the Central London Railway Company be under any liability or obligation to the plaintiffs on July 1, 1933, in respect of a notice to treat which was not given by that company but by the defendants at a later date. I think, therefore, that the first point is without substance.

The second ground on which the plaintiffs rely is based on the provisions of s. 68 of the London Passenger Transport Act, 1934. As I understand the argument it is this: the time limited by the Act of 1931 for the exercise of the compulsory powers was extended by this section, and it is only by virtue of its provisions that the defendants can exercise the power to purchase compulsorily. The section provides that the extension is to be subject to the provisions for the protection or benefit of the London County Council and any local authority company body or person contained in the Acts which are there mentioned; one of those Acts being the Act of 1931. It is argued that the provisions with regard to the assessment of compensation in the case of a compulsory purchase are provisions for the protection or benefit of the plaintiffs, and that the provisions of the Act of 1931 with regard to compulsory purchase are therefore preserved. This ground seems to me to have as little foundation as the first, and to be completely destroyed when it is realized that the Act of 1931 contains a series of sections which are expressed to be for the protection—and in one case for the protection and benefit—of a number of bodies and companies such as the London County Council, certain metropolitan borough councils, the Metropolitan Water

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Board, and the Gas Light and Coke Company. I refer to sections numbered 50 to 54 inclusive of the Act of 1931. The phrase "Provisions for the protection and benefit" of a particular body of persons is in common use in Acts of Parliament. It refers to such provisions as are contained in the sections to which I have just referred, and is not apt to refer to general statutory provisions which may incidentally afford protection or confer benefits on persons affected by them. It is sufficient to say that there is no section in the Act of 1931 expressed to be for the protection and benefit of the plaintiffs.

The third ground on which the plaintiffs rely is that the provisions of the Act of 1931—under which compensation in the event of compulsory purchase of the plaintiffs' property would have been fixed, as provided by the Lands Clauses Acts as modified by the Act of 1931—cannot be altered by reason of the provisions of the Acts of 1933 and 1934, in the absence of clear words showing that it was the intention of the two later Acts to abrogate the provisions of the Act of 1931. In support of this contention reliance is placed on the decision of the House of Lords in the case of the *Corporation of Blackpool v. Starr Estate Co., Ltd.* (1) It seems to me that this argument is based on a misconception of the decision in the *Blackpool* case (1). In that case the Blackpool Corporation acquired power to purchase lands compulsorily from a number of different owners under an Act passed in 1917. The Act contained special provisions with regard to the purchase of lands from a particular owner, the Starr Company, Ltd. After the passing of the 1917 Act, the Act of 1919 was passed. It was claimed on behalf of the Corporation that the provisions of the Act of 1919 replaced the special provisions relating to the purchase of lands from the Starr Estate Company, Ltd. The speeches show quite plainly that the maxim "generalia specialibus non derogant" applies to cases where a particular subject has been dealt with by the Legislature in an earlier Act, and there is no clear manifestation of any intention to interfere with the

(1) [1922] 1 A. C. 27.

provisions of that Act by a subsequent Act. There is, I think, no room for the application of the maxim in cases where the earlier statute is of general application. In the present case there is no special provision for or individual treatment of the plaintiffs in the Act of 1931. The plaintiffs are placed in precisely the same position as any of the other landowners whose lands are to be taken compulsorily under the Act of 1931, and there is no room for any contention on their part, as was successfully contended in the *Blackpool* case (1), that the purchase of Nos. 2 and 3 Cheapside, if effected under the Act of 1931, would not have been a compulsory purchase.

In my judgment each of the plaintiffs' contentions fails, and the action must be dismissed. The defendants are entitled to a declaration on the counterclaim that the compensation payable by them to the plaintiffs must be ascertained under and in accordance with the provisions of the Act of 1919. The plaintiffs must pay the defendants' costs of the action and the counterclaim.

Solicitors : *Baker & Nairne ; John Sloane Anderson.*

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18, 24.*In re* T. N. FARRER, LIMITED.

[00750 of 1936.]

Company—Private company—Articles of Association—Appointment of governing director for life, or until resignation or removal—Resolution for voluntary winding-up—Services of governing director dispensed with—Claim for compensation for loss of office—No breach of contract, and no damages recoverable.

By the articles of a private company a governing director, who also held practically the whole of the share capital, was so appointed for his life, or until he should resign or be removed by special resolution of the company, at a salary of 300*l.* a year. After he had continued in office for some years the company passed a resolution for voluntary winding-up, and he ceased to act as director. His assignees sought to prove in the liquidation for compensation due to him for loss of office, but the liquidator rejected the claim:—

Held, that as the only contract between the director and the company was that contained or evidenced in the articles, his employment as such was conditional on the continued existence of the company, and ceased automatically when it was wound up. But assuming there had been any breach of contract it was one in respect of which, in the circumstances, no damages were recoverable.

SUMMONS.

The above-named company, T. N. Farrer, *Ld.*, was incorporated as a private company on May 1, 1918, for the purpose of carrying on a shoe and slipper manufacturing business previously carried on at Macclesfield by Gilbert Arthur Jell under the name of T. N. Farrer. The nominal capital was 3000*l.* in 3000 shares of 1*l.*, of which 2102 were issued. G. A. Jell sold his business to the company for 2100*l.*, to be satisfied by the allotment of 2100 shares to him.

By Art. 12 it was provided that G. A. Jell should (notwithstanding clause 77 of Table A) be the governing director of the company for life, or until he should resign office or be removed by special resolution; and clause 68 of Table A was not to apply. While he retained that office (*a*) he was to exercise all the powers authorities and discretions which would be vested in directors generally and to preside as chairman at every general meeting of the company and

at every meeting of the directors ; (b) all the other directors (if any) for the time being of the company were to be under his control and bound to conform to his directions in relation to the company's business ; (c) he might from time to time appoint other persons to be directors and define and limit their powers and fix and determine their remuneration and duties and might remove any director so appointed ; (d) he might at any time convoke a general meeting of the company ; (e) his remuneration as governing director was to be at the rate of 300*l.* a year. By Art. 14 if and when the said G. A. Jell should cease to be governing director he was to become an ordinary director of the company. By Art. 15 no director should be disqualified by his office from contracting with the company either as vendor, purchaser, or otherwise. By Art. 16, clauses 35 to 40 inclusive, 73, 76, 111 and 114 of Table A were not to apply.

From 1927 to 1933 G. A. Jell was the sole director of the company. On February 5, 1934, Gilbert Cyril Jell was appointed an additional director. On October 17, 1934, an extraordinary resolution was passed to the effect that the company could not, owing to its liabilities, continue its business, and that the company be wound up accordingly, and that Frederick Sidney Parsons be appointed liquidator. A meeting of the creditors held on the following day appointed F. S. Parsons and T. F. Birch joint liquidators.

By a deed of assignment dated April 16, 1935, and made between G. A. Jell of the first part, Gilbert Cyril Jell of the second part, Frank Herbert Marlow of the third part and Percy Edward Marlow of the fourth part, G. A. Jell acknowledged that he was indebted to Frank Herbert Marlow in the sum of 3500*l.* and to Percy Edward Marlow in a further 3500*l.*, and in consideration thereof assigned unto F. H. and P. E. Marlow absolutely a debt or sum of 15,539*l.*, being an amount due or owing to the said G. A. Jell by T. N. Farrer, *Ld.*, and all other moneys (if any) owing to G. A. Jell from T. N. Farrer, *Ld.*

F. H. Marlow and P. E. Marlow proved in the liquidation of T. N. Farrer, *Ld.*, for the sum of 15,602*l.*, made

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The liquidators rejected the claim to the extent of 3587*l.*, made up of the deduction of certain items for reduced rate of interest, amounting to 287*l.*, and the whole of the 3300*l.* claimed as compensation for loss of office. The claimants, F. H. Marlow and P. E. Marlow, after some correspondence with the liquidators, took out this summons asking that the rejection of their proof might be reversed and that the proof might be allowed for 15,547*l.*

Harold Christie K.C. and *J. G. Strangman* for the applicants. Under the contract contained in the articles Mr. Jell was appointed governing director of the company for his life, at a salary of 300*l.* a year determinable only by his resignation or his removal by the passing of an extraordinary resolution. The effect of the liquidation, which in the circumstances he was bound to vote for, was to dismiss him from the service of the company, and the applicants, as assignees of all his rights against the company, claim damages based on the actuarial value of his life interest in 300*l.* a year for breach of contract: *Fowler v. Commercial Timber Co., Ltd.* (1)

Articles are not in themselves a contract, but they are evidence of the existence of a contract between Mr. Jell and the company. He was in exactly the same position as a managing director who has a contract with a company for his employment for a term of years. The terms could be altered, but only as to the future, and they were not altered. See *In re Anglo-Austrian Printing and Publishing Union: Isaacs' Case* (2); *In re New British Iron Co. Ex parte Beckwith* (3); *Swabey v. Port Darwin Gold Mining Co.* (4)

(1) [1930] 2 K. B. 1.

(2) [1892] 2 Ch. 158.

(3) [1898] 1 Ch. 324.

(4) (1889) 1 Meg. Co. Cas. 385.

Charles Harman K.C. and *J. B. Lindon* for the liquidators. Such a claim as the present has not, so far as we are aware, been made before, and if it can succeed any governing director of a company can assure himself an income for life.

A director, even a governing or managing director, is not a servant, but an officer of the company: *Hutton v. West Cork Ry.* (1); *In re Lee, Behrens & Co., Ltd.* (2); *Buckley on Companies*, at p. 35, where the law is clearly summarized. A director is only entitled to draw his remuneration so long as he acts as director; here, after the liquidation had commenced, the duties and the remuneration both ceased: *In re Consolidated Nickel Mines, Ltd.* (3); *Moriarty v. Regent's Garage Co., Ltd.* (4).

The articles of association are a matter between the shareholders as such inter se, or between the shareholders and the company; they do not create a contract between a governing director and the company: *Eley v. Positive Government Security Life Assurance Co., Ltd.* (5), a case where one who had been appointed solicitor to a company by the articles was held not entitled to sue the company for breach of contract when they ceased to employ him. The articles may be evidence of a contract, but they are not a contract signed by the party to be charged. In *Fowler v. Commercial Timber Co., Ltd.* (6), there was a special contract for the employment of the plaintiff as managing director. If a director has himself brought about a state of affairs which has led to the company going into liquidation, he cannot afterwards claim an income as governing director. Here Mr. Jell in proposing a voluntary winding-up voted for his own dismissal. If, however, he remained director, he never performed any duties as such after the liquidation, and therefore any right he had to remuneration ceased.

Either he was not dismissed, or if he was, it was not a wrongful dismissal.

If Mr. Jell's position as governing director was determined,

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(1) (1883) 23 Ch. D. 654, 672.

(2) [1932] 2 Ch. 46, 53.

(3) [1914] 1 Ch. 883.

(4) [1921] 2 K. B. 766.

(5) (1876) 1 Ex. D. 88.

(6) [1930] 2 K. B. 1.

SIMONDS J. that was an event provided for by the articles, removal by special or extraordinary resolution.

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But even assuming there has been a breach of contract, it is one for which no damages are recoverable. It may be that it is not likely that Mr. Jell would be dismissed, but the law is not concerned with the probable consequences of a general meeting. If the contractual relationship between the parties can be put an end to by a stroke of the pen the servant has suffered no damage.

A person who takes service under a contract implied in articles must do so subject to any incidents imposed by the articles. An alteration of its articles by a company cannot give rise to an action for damages. See *Shuttleworth v. Cox Brothers & Co. (Maidenhead), Ltd.* (1)

[SIMONDS J. The law undoubtedly is now clear that any prohibition of an alteration of its articles by a company is invalid; but such a power must not be exercised oppressively, only for the benefit of the company.]

Christie K.C. in reply. The applicants are entitled to prove for at least two and a half years' salary, for during that period which has elapsed since the liquidation commenced Mr. Jell has been unable to obtain any other employment in his own trade.

Cur. adv. vult.

March 24. SIMONDS J. This is an application by Mr. Frank Herbert Marlow and Mr. Percy Edward Marlow in the winding-up of T. N. Farrer, Ltd. They ask that the decision of the liquidators rejecting their proof in the liquidation to the extent of 3587*l.* may be reversed. My judgment is concerned only with 3300*l.*, part of the 3587*l.* The residue of that sum arises out of a different claim. The applicants are, and claim as, the assigns of one Mr. Gilbert Arthur Jell, and though at first some point was taken as to the validity or effect of the assignment under which they claim it was not insisted on, and I accordingly treat the applicants as entitled to assert whatever rights their assignor had.

The claim for 3300*l.* rejected by the liquidators with which I have to deal is, in the applicants' proof, described as "Claim for compensation for loss of office as managing director." The word "managing" was a slip for "governing," for the office held by Mr. Jell was that of governing director. But nothing turns on this distinction. The company was incorporated in the year 1918. Its main object was to acquire as a going concern the business then carried on under the name of T. N. Farrer, at Macclesfield, in the county of Chester, and with a view thereto to enter into an agreement referred to in the articles of association of the company. From the articles it appears that the agreement in question was an agreement with Mr. Gilbert Arthur Jell, who was no doubt the proprietor of the business. The articles adopted Table A, except as therein provided, but included the necessary provisions to make the company a private company, and also included an article dealing with Mr. Jell's position, which is of importance in this case. By Art. 12 it was provided that Mr. Jell should, notwithstanding clause 77 of Table A, be the governing director of the company for life, or until he should resign or be removed by special resolution, and that clause 68 of Table A should not apply. It was by the same article further provided that, while he retained the said office, he should have in effect plenipotentiary powers and that his remuneration as governing director should be at the rate of 300*l.* a year. Mr. Jell was a signatory of the memorandum and articles of association, and from the incorporation of the company until its liquidation he acted as its governing director, exercising the powers and receiving the remuneration prescribed by the articles.

On October 17, 1934, an extraordinary resolution of the company was passed by which it was resolved that the company should be wound up voluntarily and that Mr. Frederick Sidney Parsons be appointed liquidator. Subsequently at a meeting of creditors Mr. Thomas Fleming Birch was appointed liquidator jointly with Mr. Parsons. Mr. Jell voted in favour of the resolution for winding-up. He in fact held the whole of the issued shares by himself

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or a nominee, and no such resolution could be passed without his assent. The company was in a financial situation in which liquidation was the only honest course to take. The liquidators, having assumed office, forthwith dispensed with the services of Mr. Jell : they neither employed nor remunerated him. Accordingly the present applicants, having had assigned to them his rights, whatever they were, against the company, made their claim in the liquidation for (inter alia) the sum of 3300*l.* in the terms which I have already set out. The liquidators, on December 3, 1936, rejected this claim on the ground that Mr. Jell was not entitled to claim compensation for loss of office, and on another ground which was afterwards withdrawn.

I have, I think, stated the whole of the relevant facts, and the single question is whether, in such circumstances, Mr. Jell is entitled in the liquidation to claim damages for breach of his contract of service. His claim is expressed to be for compensation for loss of office, but this is an inaccurate way of stating a claim which, if it rests on anything, must rest on some contract which has been broken to his damage. First, then, what was the contractual relation between Mr. Jell and the company? I have no doubt that Mr. Jell, having signed the memorandum and articles, and having assumed the office of governing director and held it for some sixteen years, must, in the absence of any evidence to the contrary, be regarded as holding office on the terms of the articles. It is from them alone that the terms of his contract of service can be ascertained : see *In re Anglo-Austrian Printing and Publishing Union : Isaacs' Case*. (1) I have used the phrase "contract of service," though in some connections a director, and particularly a governing director, may not be regarded as a "servant" of the company. It is, however, a sufficiently appropriate description for the present purpose.

Secondly, what was the result of the liquidation on Mr. Jell's contract of service? Again, I have no doubt that the result of the liquidation was to put an end to the contract.

It is not necessary for me to determine whether the resolution for winding-up automatically put an end to Mr. Jell's contract, though some authority might be found for that view in the judgment of Greer L.J. in *Fowler v. Commercial Timber Co.* (1) But whether that is so or not the same case shows, if it is necessary to cite authority for it, that a resolution, followed by such action of the liquidators as was here taken, must operate as a determination of a governing or other director's service. Nor is he debarred from making a claim, if it is otherwise valid, by the fact that he has himself supported the resolution.

Thirdly, the questions arise, such being the contract and such its termination, has there been a breach of contract by the company, and, if so, what, if any, damages are recoverable? It is, in my opinion, necessary to distinguish between a case like the present one, in which the contract is constituted by the articles and the governing director has assumed office in accordance with them, and a case where, apart altogether from the articles, the company and the director have entered into an independent agreement. In the latter case, if the period of service is for a fixed term, or for the life of the director, it will be a matter of construction in each case whether a provision is to be implied limiting the employment to the term of the company's active existence, so that, if the company is wound up during the fixed term or during the life of the director, he will nevertheless have no claim by reason of the termination of his service, and as a matter of construction it may well be difficult to import such a provision into such a contract. But where the terms of the contract are to be found only in the articles, it appears to me to be reasonably clear that a condition of the continued employment of the director must be the continued existence of the company. No case has been brought to my notice where a director, having no agreement with the company outside the articles, has claimed, much less been held entitled to receive, damages because his period of office has been brought to a premature end by the winding-up of the company.

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(1) [1930] 2 K. B. 1, 6.

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On the contrary, such cases as *In re South Western of Venezuela (Barquisimeto) Ry. Co.* (1) appear to me to be inconsistent with the maintenance of such a claim. On this ground alone—namely, that the employment of the governing director was, as a matter of contract, limited to the active life of the company—I should uphold the decision of the liquidators and dismiss the application. I should, however, add that the same result may be reached by a consideration of the damages resulting from a breach of contract, if there were a breach. for, if the terms of the contract are to be found in the articles|| they must include the term that the governing director may be removed by special resolution of the company and, I think, also the term that his tenure of office must always be subject to the relevant articles themselves being altered under the statutory power.

In effect, therefore, Mr. Jell was employed on terms under which it was competent for his employer, at any moment, to dismiss him. I do not think I can speculate on the probability or improbability of the right of dismissal being exercised. It appears to me impossible to hold that a servant can, on the termination of his contract of service, however it may be terminated, recover damages by reason of such termination from a master who can at any moment dismiss him.

I therefore dismiss, with costs, the application so far as it relates to the sum of 3300*l.* I should, perhaps, add that, having decided that no damage is recoverable, I have not thought it necessary to discuss the amount which might, in another view, be recoverable; but I must not be taken as assenting to the proposition that 3300*l.* could be recovered. That seems to me to be, in any view of the case, an excessive amount.

Solicitors: *Langford, Borrowdale & Thain; Robinson & Bradley.*

MIDDLESEX COUNTY VALUATION COMMITTEE v. C. A.
 WEST MIDDLESEX ASSESSMENT AREA COMMITTEE. 1936

[1936. M. 2275.]

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July 14.

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Jan. 21, 22.

Rating—County Valuation Committee—Attendance of representative of County Valuation Committee at meetings of assessment committee—Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), s. 17, sub-s. 5; s. 18, sub-s. 2; Sch. I., para. 1.

By s. 18, sub-s. 2, of the Rating and Valuation Act, 1925: "It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this Part of this Act. . . ."

By Sch. I., para. 1, subject to the provisions of the Act, the assessment committees are given general powers to regulate their own proceedings.

Held, by the Court of Appeal, that a county valuation committee under s. 18, sub-s. 2, of the Act of 1925 is entitled to send its valuation officer or duly authorized representative to meetings of an assessment committee during the hearing by them of any objections to draft valuation lists or of any proposals to amend current valuation lists, and the assessment committee have no right to exclude him from such meetings.

Per Romer L.J.: Power to attend such meetings is one of the powers conferred upon county valuation committees by s. 18, sub-s. 2, of the Act, and, that being so, it is not possible for an assessment committee to exclude an officer properly appointed for the purpose of the valuation committee from one of those meetings on the plea of exercising the power conferred upon them by the First Schedule to the Act of regulating their proceedings. The powers so given to the assessment committees of regulating their proceedings are in terms conferred subject to the provisions of the Act.

Headnote to *Rex v. Assessment Committee (N. E. Surrey)*.
Ex parte F. W. Woolworth & Co. [1933] 1 K. B. 776 corrected.

MOTION.

The action was brought by the plaintiffs, the Middlesex County Valuation Committee, against the defendants, the West Middlesex Assessment Area Committee, claiming by their writ (1.) a declaration that they by their valuation officer or other duly authorized representative were entitled to attend the meetings of the defendants during the hearing of all proposals to amend current valuation lists, and (2.) an injunction to restrain the defendants from excluding the plaintiffs' valuation officer or other their duly authorized

C. A. representative from their meetings during the hearing by the
 1936 defendants of any draft valuation lists or of any proposals
 MIDDLESEX to amend current valuation lists.

COUNTY The plaintiffs directed their county valuation officer, or
 VALUATION some responsible person representing him, to attend the
 COMMITTEE meetings of the defendants for the purpose of informing
 v. WEST himself of what took place at those meetings, but also for
 MIDDLESEX the purpose of tendering information or advice and otherwise
 ASSESSMENT taking part in the proceedings. The defendants objected to
 COMMITTEE. the attendance of any person representing the plaintiffs and
 claimed the right to exclude him. The plaintiffs thereupon
 commenced the present proceedings and moved before
 Farwell J. for an interlocutory order in the terms of their writ.

Tyldesley Jones K.C. and *Michael E. Rowe* for plaintiffs.
 Under s. 18, sub-s. 2, of the Rating and Valuation Act, 1925,
 it is the duty of the plaintiffs to take such steps as they think
 fit for promoting uniformity in the principles and practice of
 valuation and assisting rating authorities and assessment
 committees in the performance of their functions under the
 Act. In order to perform that duty the plaintiffs must send
 representatives to the meetings of assessment committees.
 There is nothing in the Act which entitles an assessment
 committee to exclude a representative of the plaintiffs.

[They referred to *Rex v. Assessment Committee (N. E. Surrey)*. *Ex parte F. W. Woolworth & Co.* (1) and *Coulsdon and Purley Urban District Council v. Surrey County Council*. (2)]

Comyns Carr K.C. and *J. Scott Henderson* for defendants.
 The plaintiffs have no right to send one of their officers to
 the meetings of the defendants for a purely inquisitive purpose.
 In *Tenby Corporation v. Mason* (3) and similar cases the
 decisions are of a general nature, but they show that the
 defendants were entitled to act as they have done here.

Purcell v. Sowler (4) and *Pittard v. Oliver* (5) show the
 desirability of holding the meetings of a board of guardians

(1) [1933] 1 K. B. 776.

(2) [1934] Ch. 694.

(3) [1908] 1 Ch. 457.

(4) (1877) 2 C. P. D. 215.

(5) [1891] 1 Q. B. 474.

in camera. The defendants have the right to hold their meetings in camera. Sect. 18, sub-s. 2, of the Rating and Valuation Act, 1925, has very little relevance. Sect. 27, sub-s. 2, of that Act gives assessment committees the power to revise their draft lists, and s. 28 enables them to give their final approval of the valuation list without the assistance of anybody. The plaintiffs have no right to send a representative, as a supervisor, to meetings of the defendants and the defendants were quite justified in excluding him.

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Tyldesley Jones K.C. replied.

FARWELL J. This matter comes before the Court by way of interlocutory motion. The plaintiffs seek by the writ in the action against the defendants, first: "A declaration that the plaintiffs by their county valuation officer or other their duly authorized representative are entitled to attend meetings of the defendants during the hearing of all objections to draft valuation lists and all proposals to amend current valuation lists"; secondly, "An injunction to restrain the defendants, their servants or agents from excluding the plaintiffs' county valuation officer or other their duly authorized representative from their meetings during the hearing by the defendants of any objections to draft valuation lists or of any proposals to amend current valuation lists."

The relevant facts in this case are very simple and are not in dispute. The plaintiffs have directed their county valuation officer, or some responsible person representing him, to attend the meetings of the defendants, not only for the purpose of informing himself of what takes place at those meetings, but also for the purpose of tendering information or advice and otherwise taking part in the proceedings. The defendants object to the attendance of any such person and claim the right to exclude him. The question that I have to determine is whether the defendants have such a right.

Both the plaintiffs and the defendants are bodies constituted by the Rating and Valuation Act, 1925. By that Act their duties and obligations are regulated, and it is in

C. A. that Act, and that Act alone, that the answer to the question
1936 I have to determine must be sought.

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The Rating and Valuation Act, 1925, is entitled "An Act to simplify and amend the law with respect to the making and collection of rates by the consolidation of rates and otherwise, to promote uniformity in the valuation of property for the purpose of rates, to amend the law with respect to the valuation of machinery and certain other classes of properties, and for other purposes incidental to or connected with the matters aforesaid." It was said on behalf of the defendants that there is nothing novel in the reference in the title to promotion of uniformity, that similar words are to be found in earlier Rating Acts. I fail to appreciate the relevance of that observation. Whether the words be new or not, they do form part of the title of the Act and must be taken into consideration in considering the Act as a whole. The Act sets up new machinery for the purpose of valuing property for rating purposes.

The Act is one of a considerable number of sections, but it will not, I think, be necessary for me, for the purpose of this judgment, to refer to more than comparatively few of them. Sect. 1, sub-s. 1, provides: "The council of every county borough and the council of every urban and rural district shall be the rating authority for the borough or for the county district, and from and after the appointed day no authority or person other than the council shall have power to make or levy any rate within the borough or district." Sub-s. 2: "As from the appointed day all powers and duties of the overseers of the poor in relation to the making, levying, and collection of rates, and of any other person who by virtue of any local Act has powers in that behalf, shall in every rating area be exercised and performed by the rating authority." Then there are other provisions in that section.

Sect. 2 provides for the levy of, and provisions as to, a general rate.

I think now I can turn to s. 16 as the next section which for this purpose is material. Sub-s. 1 provides: "Subject to the provisions of this Part of this Act county boroughs and

such other areas as may be constituted by scheme made under this section shall be assessment areas for the purpose of this Part of this Act." Then it provides for the scheme.

Sect. 17, sub-s. 1, provides: "There shall be an assessment committee for every assessment area." Now it is under this section that the defendant committee is constituted. Sub-s. 2 is in these terms: "The assessment committee for an assessment area shall, in the case of an assessment area being a county borough, be appointed" Then it provides how they shall be appointed and who are the persons to constitute the board. In sub-s. 5 it is enacted: "The provisions contained in the First Schedule to this Act shall have effect with respect to assessment committees."

When I turn to the First Schedule of the Act, I find the first provision there is: "Subject to the provisions of this Act, the quorum, proceedings and place of meeting of an assessment committee shall be such as the committee determine, and meetings of the committee may be held at different places from time to time as the committee think proper having regard to the public convenience." Then there is a proviso which I need not read and a proviso that the quorum shall not be in any case less than three. Then there are provisions for the chairman having a casting vote and minutes being kept, and other matters of that sort. Putting it quite generally, subject to the provisions of the Act, the assessment committee have the right to regulate their own proceedings.

Sect. 18 provides for county valuation committees, and under this section the plaintiff committee is constituted. Sub-s. 1 provides: "For the purposes of this Part of this Act there shall be established in every county a committee of the county council (to be called 'the county valuation committee') consisting of such number of persons, being members of the council of the county, as the council may think fit to appoint and of a representative of the assessment committee for each assessment area which, or any part of which, is comprised in the area of the county to be nominated by the assessment committee."

Sub-s. 2 provides: "It shall be the duty of every county

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C. A. valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this Part of this Act, and for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conference."

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Then sub-s. 3 provides: "A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee or other county valuation committee, appear as a party to any objection or appeal under this Part of this Act: Provided that the committee shall not be entitled so to appear in opposition to any objection made or appeal brought by the occupier of the hereditament affected unless not less than three days before the date of the hearing of the objection or, in the case of an appeal, such longer period as may be required by the rules relating to appeals, the committee have given notice in writing to the occupier stating their intention so to appear and the grounds of their opposition or the representations which they propose to make at the hearing."

Then I think I may pass to s. 25, which provides for the preparation of valuation lists, and the succeeding sections deal with those matters. Sect. 31 deals with appeals to quarter sessions; I do not think it is necessary for me to refer in detail to those matters.

Sect. 37 provides for the amendment of current valuation lists.

I do not think it is necessary for me to refer to any other sections of the Act, because the question really comes down to this: Does the power which undoubtedly is given to the defendants of regulating their own meetings entitle them to

exclude and refuse admission to an officer of the plaintiffs who has been directed by the plaintiffs to attend and take part in the meetings of the defendants? It is to be noticed that the power to regulate their proceedings is subject to the provisions of this Act, and in my judgment the answer to the question which I have to determine, namely, whether the defendants have the right to exclude such a person as I have mentioned, must be in the negative.

By s. 18, sub-s. 2, the plaintiffs are directed that it is the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity. If the plaintiffs, as such committee, think it right and necessary, for the purpose of promoting uniformity, to direct their officer to attend the defendants' meetings, that seems to me to be a step within the meaning of that sub-section, and if they take such a step it is not open to the defendants to nullify the step which the plaintiffs have taken, by refusing admission to their meetings to the person so directed by the plaintiffs to attend. In my judgment, therefore, the defendants have not the right which they claim, of excluding such a person.

It must, however, be remembered that the plaintiffs, by directing their officer to attend the meetings, do not and cannot make him a member of the defendant body. The constitution of the defendant body is provided by the Act and it does not include such a person. Therefore such a person is not a member of the defendant committee and he is therefore not entitled to participate in the decisions to which the committee may come. That is clearly laid down by the Divisional Court in *Rex v. Assessment Committee (N. E. Surrey)*. *Ex parte Woolworth & Co.* (1) In my judgment, the headnote in that case goes further than the effect of the decision as stated by the learned judges. It was a decision to the effect that a county valuation officer was not intended to be present or take any part in the decision of the committee.

Secondly, it must be borne in mind that the plaintiff

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(1) [1933] 1 K. B. 776.

C. A. committee cannot direct their officer to do anything which
 1936 by the Act it is necessary he should omit to do, or to omit
 MIDDLESEX to do anything which by the Act it is necessary he should
 COUNTY do. Accordingly, in any cases where by the Act notices are
 VALUATION required, or other matters of that sort are necessary, those
 COMMITTEE v. notices, of course, must be given, and without them the
 WEST plaintiffs are not entitled, either by that particular repre-
 MIDDLESEX sentative or any one else, to participate in those matters for
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Subject to those qualifications, it appears to me that the plaintiffs, under sub-s. 2 of s. 18, have the power to direct, if they think it necessary for the purpose of promoting uniformity, that an officer of theirs should attend the meetings of the defendants and take part in those meetings to the extent which I have mentioned.

In those circumstances, and for the reasons which I have endeavoured to express, I have come to the conclusion that the plaintiffs are entitled to the relief which they seek. There must be an injunction in the terms of the notice of motion until the trial or until further order; and the costs of the motion will be costs in the action.

P. J. B.

C. A. The defendants appealed. The appeal was heard on January 21 and 22, 1937.

Comyns Carr K.C. and *J. Scott Henderson* for the appellants. The representative of the Middlesex County Valuation Committee is not entitled to attend private meetings of the assessment committee unless they are in one form or another parties to the inquiry being held or have given statutory notice of their intention to attend. He is not entitled, as the valuation committee claim, to attend (1.) to inform himself or (2.) with a view to intervening in the inquiry at some later stage without having given notice of this intention. Valuation committees were established under s. 18 of the Rating and Valuation Act, 1925, with the object of promoting uniformity in the principles and practice of valuation, and

the plaintiffs therefore claim a general right to attend proceedings before the assessment committee. The assessment committee say that the valuation committee has no right to attend unless it is expressly conferred on them by the Act. The constitution of the assessment committee is laid down in s. 17, and they have under this Act no duty but to hear and determine cases brought before them. Sect. 27 deals with the procedure for revising the draft valuation list, and in this case the valuation committee have a wide power to attend and be heard and to examine and call witnesses. The valuation committee contend that s. 27 gives them a right to be heard although they had given no notice of their intention to support one side or the other and only intervened at a later stage. But nothing in s. 27 overrides the provision in regard to notice in s. 18, sub-s. 3, and the right to attend and oppose when the occupier is objecting to a valuation depends on notice being given beforehand. Further s. 27 only gives a right to attend when the valuation committee propose to take part in the proceedings. Sch. IV., Part III., to the Act makes provision in regard to meetings for hearing objections, and by inference para. 4 shows what persons may attend. Being a party to proceedings is a condition to appealing to quarter sessions: see s. 31 and s. 37, sub-s. 8. It must be remembered that for the purpose of securing uniformity the valuation committee can obtain information as to any proceedings from the assessment committee under s. 40, sub-s. 6, of the Act. The claim to a general right to attend runs contrary to the circumstance that special provisions are inserted in the Act giving a right to attend. If s. 27, sub-s. 1, be treated as giving the valuation committee power to attend at the hearing of proposals, it is inconsistent with or contrary to s. 37, sub-s. 4.

It cannot have been intended by Parliament that the county valuation officer should have the right to be present during the consideration by the assessment committee of their decision. It is quite clear that a public authority, except a parish council, can sit in private. If Parliament had intended that a county valuation officer should have a right to be

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C. A. present at meetings of the assessment committee it would
 1937 have said so in more definite terms than it has done in s. 18,
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 v. at the meetings unless he has made himself a party to these
 WEST proceedings.

[They also referred to *Rex v. Assessment Committee (N. E. Surrey)* (1); *Foster v. Great Western Ry. Co.* (2); *Purcell v. Sowler* (3); *Tenby Corporation v. Mason* (4); *Redheugh Colliery, Ltd. v. Gateshead Assessment Committee.* (5)]

Tyldesley Jones K.C. and *Michael Rowe* for the respondents.
 It is the practice in every county to appoint a valuation officer to work the Act: see ss. 55, 71, sub-s. 9.

Before the Act of 1925 valuation lists were prepared by the guardians. The Act of 1925 was passed to remedy the defect of the valuation of county rates being allowed to remain totally out of date. New assessment areas were constituted and the Act was passed to secure uniformity in the practice of rating. A central valuation committee was set up, (see s. 57), which was an advisory body to advise the Minister, and the only way in which the Act could be carried into effect was by the valuation committee appointing an officer to attend the meetings of every rating authority. This is the first case in which this practice has been objected to.

As was pointed out by Clauson J. in *Coulsdon and Purley U. D. C. v. Surrey County Council* (6): "The county valuation committee is bound to promote uniformity in the principles and practice of valuation, as well as bound to assist rating authorities and assessment committees in the performance of their functions, and they are bound to take such steps as they think fit for the purpose." It is submitted that the valuation committee have a right to be present by their authorized officer at meetings of the rating authority to tender them their advice before the assessment committee draw up their valuation lists. The valuation committee are

(1) [1933] 1 K. B. 776.

(2) (1882) 8 Q. B. D. 515.

(3) (1877) 2 C. P. D. 215.

(4) [1908] 1 Ch. 457.

(5) [1924] 1 K. B. 369.

(6) [1934] 1 Ch. 694, 705.

put in that position in order that they may protect the general body of ratepayers and promote uniformity of rating.

By s. 40, sub-s. 6: "Every assessment committee and every rating authority shall furnish to the county valuation committee all information which the county valuation committee may require for the discharge of functions under this Part of this Act and which it is in the power of the committee or the rating authority to furnish." The appellants are therefore bound to furnish the respondents with all information which is necessary to enable them to carry out their duties under s. 18, sub-s. 2.

[LORD WRIGHT M.R. There is no power in the Act to ask for information except s. 40, sub-s. 6.]

That is so.

The respondents do not ask the Court to hold more than that they are entitled to be present at these meetings. They do not ask for any definition of their rights.

Scott Henderson replied.

LORD WRIGHT M.R. This is an appeal from a judgment of Farwell J., and I will say at once that the question before the Court is that which is defined in the writ and nothing more. I say that because there are one or two observations of Farwell J. which might be construed as dealing with wider aspects, though, reading the judgment as a whole, I do not think that construction would be a fair one. It may be that in the course of the argument before him the contentions strayed beyond the precise question that had to be decided. That may be inevitable, but so far as I am concerned the only question I intend to direct my mind to is whether the plaintiffs are entitled to the declaration which they ask, and which in terms has been granted to them by the learned judge. There is, I think, no difference between the declaration asked for and that which is ordered.

The writ asks for "(1.) A declaration that the plaintiffs by their county valuation officer or other their duly authorized representative"—which I suppose includes his deputies or assistants—"are entitled to attend meetings of the defendants

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during the hearing of all objections to draft valuation lists and all proposals to amend current valuation lists." There is no declaration asked for upon any wider question, such, for instance, as whether under that declaration the county valuation officer or the other representatives of the county valuation committee would be entitled to take any part in the proceedings if they were admitted, except in so far as they are acting under the various specific provisions of the Act to which I may briefly advert, though I have no intention of seeking to construe the somewhat complicated interlocking provisions which deal with the powers of the county valuation committee to appear as a party and so forth. These questions are entirely outside the ambit of these proceedings.

Put very briefly, the contest between the two parties is this: Under s. 18, sub-s. 2, of the Rating and Valuation Act, 1925, we have these words: "It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this Part of this Act"—that is, Part II., which deals with valuation. It is argued that these general powers and duties impose at any rate a power or a right on the part of the county valuation officer to be present during the proceedings of the committee, subject to the various limitations which I shall refer to in a moment. Against that it is said that under the First Schedule, para. 1, the assessment committee have a general right or discretion to regulate their proceedings, and that that would include the power or discretion to exclude the county valuation committee's officer. The answer to that is that that power is subject to the provisions of this Act, and if, therefore, we find within the ambit of s. 18, sub-s. 2, that the county valuation officer has a right to be present at the meetings of the committee, then the power to regulate the proceedings would not include and cannot include a power to exclude him and prevent him from exercising that right. What powers or functions may attach to the assessment committee under s. 1 of the First

Schedule it is not necessary, as I have already said, to consider here beyond the matter which is expressly before the Court.

The county assessment committee is the assessment committee for the area (there are many assessment areas in every county, I assume) and is a body appointed under s. 16 of the Act: "(1.) Subject to the provisions of this Part of this Act county boroughs and such other areas as may be constituted by schemes made under this section shall be assessment areas for the purposes of this Part of this Act." Sect. 17 provides that there shall be an assessment committee for every assessment area to discuss further the constitution of the area. That section deals with the assessment committee and also provides that the assessment committee for an assessment area shall be appointed as soon as may be after the passing of this Act and as from the appointed day shall exercise such powers and perform such duties as are conferred on them by this Act, and the old assessment committees are to cease to exist. Then (sub-s. 3): "In the case of an assessment area being a county borough, the assessment committee shall consist of such number of persons to be appointed by the council of the borough as may be determined by the council, and of the persons to be so appointed not less than one-quarter shall be persons appointed to represent the boards of guardians." That, of course, is no longer the law, because the boards of guardians have been abolished. I need not further refer to s. 17. Then in s. 18, sub-s. 1, there is a provision for the establishment in every county of "a committee of the county council (to be called 'the county valuation committee') consisting of such number of persons, being members of the council of the county, as the council may think fit to appoint and of a representative of the assessment committee for each assessment area which, or any part of which, is comprised in the area of the county to be nominated by the assessment committee." It is at once obvious that the county valuation committee is a body which covers a wider area than any of the assessment committee areas, and the whole purpose of having the county valuation committee, as is stated in s. 18,

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C. A. sub-s. 2, of the Act, is shown by the definition of their
1937 duty: "It shall be the duty of every county valuation
MIDDLESEX committee to take such steps as the committee think fit for
COUNTY promoting uniformity in the principles and practice of
VALUATION valuation and assisting rating authorities and assessment
COMMITTEE committees in the performance of their functions under this
v. Part of this Act," and then the sub-section goes on: "and for
WEST the purpose of the performance of the said duty the committee
MIDDLESEX shall have power, either alone or in conjunction with county
ASSESSMENT valuation committees for other counties, to hold conferences
COMMITTEE. with persons representing assessment committees (including
assessment committees for county boroughs) and to bring to
Lord Wright the notice of any rating authorities or assessment committees
M.R. any conclusions arrived at or recommendations made by the
committee or at any such conference." The words which
are relied upon as giving this right to the county valuation
committee by its appropriate officer to be present at the
meetings of the assessment committee are the general words
defining the duty to take such steps as they think fit to
promote uniformity in the principles and practice of valuation
and to assist rating authorities and assessment committees in
the performance of their functions. That is to say, their
duty is to take steps to secure that there is not a disconformity
as between one assessment area and another, and that there is
not an unfair distribution of the burden of taxation over the
different parts of a county. They are the county authority
having these duties in respect of the various more local com-
mittees who do the work of assessment in each assessment area.

The argument which is put forward and which has found
favour with the learned judge is that it is necessary for the
performance of these duties that the valuation committee should
have knowledge of the proceedings which take place before
the various assessment committees. They have indeed certain
express powers given to them in the way of seeking and
obtaining information. I need, I think, only refer to one or
two of those powers. Under s. 40, sub-s. 6, there is a very
comprehensive provision: "Every assessment committee and
every rating authority shall furnish to the county valuation

committee all information which the county valuation committee may require for the due discharge of their functions under this Part of this Act"—still Part II., which deals with valuation—"and which it is in the power of the assessment committee or the rating authority to furnish." That is a very wide power, and it gives them the right, for instance, to have notice of intended meetings and to have copies of various notices of objections or proposals or matters of that sort which will come before the county's various assessment committees. That is one provision which shows the scope of their duties and the material which they may seek from the assessment committee in order to discharge these duties. Under s. 38 they are entitled to employ valuers who have power to enter on, survey and value any hereditament in the area of the authority or committee, subject to certain requirements as to notice or authorization. Under s. 55 they have the power to appoint various officers, including valuation officers, as they may think fit.

I refer to these express powers as showing the scope of their duties, but it seems to me that the respondents here are right in their contention that the wide words imposing upon them the duty to take such steps as they think fit for promoting uniformity in the principles and practice of valuation and so forth necessarily carry with them the right which they claim to possess, because I agree with their argument that unless they are able to be present and hear what goes on at the meetings of the assessment committee they will be seriously prejudiced in their task of promoting uniformity in the principles and practice of valuation. They say it is essential for them that they should hear what is done in respect of particular cases which come before the assessment committee, that it is necessary for them to know how valuations and assessments are being dealt with, and what decisions are being arrived at, and that they can only do so fairly and properly by being present at these proceedings.

There are, of course, certain limitations to be borne in mind; for instance, it is not contended, and could not successfully be contended, that however wide the power of

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being present, which is the power given by s. 18, sub-s. 2, that power extends to their being present at the deliberations of the committee when they are arriving at a decision. That that is so—and it would scarcely call for a decision—appears in *Rex v. Assessment Committee (N. E. Surrey)*. *Ex parte F. W. Woolworth & Co.* (1), where it was held by the Divisional Court that the county valuation officer was not entitled to be present when the assessment committee were considering their decision. That was the whole scope of the decision, though for some reason the reporter in the headnote to the report of the case in the Law Reports has stated the effect of the case much too widely, because he has stated the effect of the decision as being that the county valuation officer “is disqualified from being present with the committee while they are hearing the proposal or considering their decision.” The words “while they are hearing the proposal or” have no justification whatever in the judgment, and should be struck out. I am not sure that the words “being present with the committee” are very apt, but I think they sufficiently indicate the scope of the decision. I need scarcely point out that a question of that sort is entirely different from the question which is raised by this declaration. The decision which the assessment committee are arriving at is the decision of the committee itself. The county valuation committee have nothing whatever to do with the formulation of the decision, which is purely the function of the assessment committee itself as a judicial body. It would be most improper on general principles of law that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision. That case, therefore, throws no light upon the matter to be decided here, because the appellants are not asking for any such right.

There is another matter which has been referred to a great deal in the course of the arguments here, and that is a matter dealing with the various provisions of the Act which give specific and, as I think, quite separate powers to the county

valuation committee to take an active part in the proceedings, to act as a partisan, or to take sides in the proceedings of the committee, when dealing with the particular questions of valuation. In s. 18, sub-s. 3, it is provided that : " A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee or other county valuation committee, appear as a party to any objection or appeal under this Part of this Act "—that is Part II. again ; and then there is a proviso : " Provided that the committee shall not be entitled so to appear in opposition to any objection made or appeal brought by the occupier of the hereditament affected unless not less than three days before the date of the hearing of the objection or, in the case of an appeal, such longer period as may be required by the rules relating to appeals, the committee have given notice in writing to the occupier stating their intention so to appear and the grounds of their opposition or the representations which they propose to make at the hearing." That proviso obviously only refers to opposition, and I am not concerned here to define the exact scope of those powers of appearing as a party, which I think means as an active party or a partisan. That power, I think, is entirely different from the general power which in my opinion is implied from the words I have ready read from sub-s. 2 of the same section.

There are other similar provisions in the Act. For instance, in ss. 26 and 27 there are provisions for the procedure in regard to objections to the draft valuation lists and certain rights of taking part in these proceedings are given to the county valuation committee. Sect. 26, sub-s. 1, provides : " Any person (including the county valuation committee and any local authority) aggrieved by the incorrectness or unfairness of any matter in the draft list " and so forth " may . . . lodge an objection with the assessment committee at any time. . . ." That gives the county valuation committee under those circumstances a specific power of intervening as a party. Then s. 27, sub-s. 1, enacts : " The assessment committee shall hold meetings for considering any objections made to the draft list in accordance with the

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provisions of this Part of this Act, and on the consideration of any objection the objector, the rating authority, the county valuation committee, and the occupier of the hereditament to which the objection relates shall be entitled to appear and to be heard, and to examine any witness before the assessment committee and to call witnesses." The words "to appear" there, I think, take their colour from the following words, and show clearly that what is being dealt with there is a specific right to take an active part in the contest and to exercise all such rights as a party litigant—if I may inaccurately describe the position in that way only to indicate the function which the committee seem to be exercising if they act under that section—would ordinarily be entitled to take. Then there is a provision as to notice. All these provisions must be fulfilled if the committee is to claim to exercise the specific rights so given. I may say two things under s. 27. One is that it does appear that those provisions further support the view I have formed that the committee have a general right of being present, because it does seem to me that the words "entitled to appear" are not limited to the outset of the proceedings, but it may be that a county valuation committee by its appropriate officer being present at the proceedings may be minded in the course of the proceedings to exercise his right to appear so long as he has fulfilled the appropriate conditions as to notices if and when any such conditions apply. I notice also that conditions as to notice may be waived by the persons concerned. These provisions deal with the question of objections to the draft list. The question of what I call proposals, that is to say proposals made for the alteration or amendment during the period in which a list is current, are separately dealt with under s. 37. This contains detailed provisions, and I need not refer to them. I will merely repeat what I said in regard to the sections I have just been discussing, that the county valuation committee is given there a specific power to appear and take an active part in the proceedings, and there are certain conditions as to notice and so forth and limitations as to the cases in which such appearance can be made, which

have to be observed. I only refer to those provisions in order to distinguish them from what I regard as the general implied power under s. 18, sub-s. 2, which I think, as I have already said, includes the power to be present and to prevent the assessment committee from excluding the county valuation officer from those proceedings.

I think, therefore, the learned judge was right in making the declaration which he did, and that the appeal should be dismissed with costs.

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ROMER L.J. The steps that may be taken by a county valuation committee for the purpose of carrying out the duty imposed upon them by s. 18, sub-s. 2, of the Act must, of course, be steps that do not infringe any general principle of law. No one, for instance, could for a moment suggest that for the purpose of obtaining information a valuation officer could burglariously enter the house of the chairman of the assessment committee. Consistently with that view it was held by the Divisional Court in the case to which the Master of the Rolls has referred that the valuation officer was not entitled to be present with the committee when they were considering their decision on an objection or proposal. The presence of the valuation officer with the committee on such an occasion would infringe one of the fundamental principles of law relating to the administration of justice in this country. But I know of no general principle of law which could possibly be infringed by the mere presence of the valuation officer at the meetings of the assessment committee when dealing either with an objection or with a proposal. In my opinion, power to attend such meetings is one of the powers conferred upon county valuation committees by s. 18, sub-s. 2, of the Act. That being so, it is not possible for the assessment committee to exclude an officer properly appointed for the purpose of the valuation committee from one of those meetings on the plea of exercising the power conferred upon them by the First Schedule to the Act, of regulating their proceedings. The powers so given to the assessment committees of

C. A. regulating their proceedings are in terms conferred subject to the provisions of this Act.

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COMMITTEE.

Romer L.J.

I will only add this : s. 18, sub-s. 2, does not impose upon an assessment committee the obligation to perform any positive act ; but it does impose upon the assessment committee, in my judgment, the obligation not to do any act which would interfere with the proper exercise by the valuation committee of the powers conferred upon that committee. Farwell J., therefore, in my opinion, properly made the declaration asked for, and would properly have granted an injunction to restrain the defendants from interfering with the plaintiffs in the exercise of that power to which I have referred had the injunction been asked for.

I agree that this appeal fails and must be dismissed with costs.

GREENE L.J. I agree.

Appeal dismissed.

Leave to appeal to House of Lords refused.

Solicitor for appellants : *H. G. Greenwood.*

Solicitor for respondents : *C. W. Radcliffe.*

W. I. C.

In re COUSEN'S WILL TRUSTS.WRIGHT *v.* KILLICK.

[1936. C. 3080.]

FARWELL
J.1937
March 1.*Will—Construction—Substitutionary gift—Lapse.*

A testator by his will gave a half share of his residuary trust fund to the children of S. M. C. who should be living at his death, provided always that if any child of S. M. C. should die in the lifetime of the testator, whether before or after the date of his will, leaving issue living at his death, the share which such child would have taken if he or she had survived the testator should be held in trust for his or her personal representatives as part of his or her personal estate. No child of S. M. C. survived the testator. One child, a daughter, C. S. C., married W. A. She died intestate in the lifetime of the testator, leaving her husband, W. A., who became her personal representative and beneficially entitled to the whole of her estate, and a daughter, J. W. W. A., having made certain dispositions by his will in favour of J. W., also died in the lifetime of the testator. J. W. survived the testator :—

Held, that as W. A. died in the lifetime of the testator there was a lapse and the half share of the residuary trust fund went back into the testator's estate.

ADJOURNED SUMMONS.

The testator, James Cousen, by his will, dated June 10, 1907, after making a specific bequest, devised and bequeathed all the residue of his real and personal estate to his wife, Sarah Jane Cousen, subject to the payment of his funeral and testamentary expenses and debts. After the death of his wife, half the residuary trust fund was to be held upon trust "for all the children of my late uncle Samuel Mann Cousen who shall be living at my decease in equal shares and as to and concerning the other half thereof for all the children of my late aunt Mary Atkinson who shall be living at my decease in equal shares Provided always and I declare that if any child of my late uncle Samuel Mann Cousen or of my late aunt Mary Atkinson shall have died in my lifetime whether before or after the date of this my will leaving issue living at my death the share in the residuary trust funds which such child would have taken if he or she had survived me shall be held in trust for his or her personal representatives as part of his or her personal estate."

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The testator died on May 20, 1919. His wife, Sarah Jane Cousen, died on December 6, 1930. On the death of Sarah Jane Cousen, it became necessary to ascertain, if possible, who were the persons to take under the gift over. By an order dated June 11, 1934, an inquiry was directed as to the children of Samuel Mann Cousen and Mary Atkinson. On March 14, 1935, the Master made his certificate in answer to the inquiry. By that certificate it was shown that no child of Samuel Mann Cousen or Mary Atkinson was living at the death of the testator. One child of Samuel Mann Cousen, Catherine Sarah Cousen, married William Alcock and died in the lifetime of the testator, leaving a daughter, Jane Wright, living at his death. The personal representative of Catharine Sarah Alcock was the plaintiff, Stephen Poyntz Wright. William Alcock survived his wife and became her legal personal representative and was beneficially entitled to the whole of her residuary estate. He died in 1901. Jane Wright was the next of kin of Catherine Sarah Alcock at the date of the death of the testator and was entitled for her life to the income of the residuary estate of William Alcock under his will. She was given a power of appointment by the will of William Alcock over his residuary estate. By a deed dated December 29, 1920, she exercised the power in favour of William Poyntz Alcock.

In these circumstances the plaintiff issued this summons, which raised the question whether there was a lapse of the half share of the testator's estate given to the children of Samuel Mann Cousen.

J. M. Gover K.C. and *A. H. Droop* for plaintiff. The half share of the residuary trust fund must be treated as forming part of Mrs. Alcock's estate and go in the same way as the rest of her estate went, that is to say, to William Alcock and persons claiming under his will. The persons who took her estate beneficially took it as cestuis que trust and not as personae designatae: *Long v. Watkinson* (1) and *Lord Advocate v. Bogie* (2); but see *In re Bosanquet*. *Unwin v. Petre*. (3) Alternatively we say that the decision of Sargant J. in *In re Bosanquet* (3), where he

(1) (1853) 17 Beav. 471.

(3) (1915) 113 L. T. 152.

(2) [1894] A. C. 83.

made the donee's will date, not from her death, but from the death of the donor, should be followed, and that Mrs. Alcock's intestacy should take effect as from the testator's death. That would give the half share to Jane Wright as William Alcock's next of kin at the date of the testator's death.

Fergus Morton K.C. and *G. P. Slade* for a residuary legatee under the will of William Alcock. The half share must follow the estate of Mrs. Alcock.

Charles Harman K.C. and *Wilfrid Hunt* for the personal representatives of the testator. The residuary trust fund formed part of the testator's estate, and therefore any one dying before him cannot take. William Alcock cannot take or any one through him; there must be a lapse. Sargant J. in *In re Bosanquet* (1) followed Lord Watson in *Lord Advocate v. Bogie*. (2) Kay J. held in *In re Valdez's Trust* (3) that there was a lapse, and the view taken by Parker J. in his judgment in *In re Greenwood* (4) shows that in a case of this kind he would favour the doctrine of a lapse. The testator's will failed to dispose of this moiety of the residuary trust fund and it remains part of his estate. They also cited *In re Hensler*. (5)

D. M. McQueen for a trustee of the will of William Alcock. *Gover K.C.* replied.

FARWELL J. This question which I have now to determine is one, I think, of very considerable difficulty. It is quite plain that if there had been no provision, as there is here, for the event of one of the named persons predeceasing the testator and a substitutionary gift for the personal representative of that person, there must have been a lapse so far as that share is concerned and to that extent the estate would not have been disposed of, but the testator makes provision to prevent that event happening by providing that if such a person as the lady in question died in the lifetime of the testator, then the share which she would have taken if she had survived was to be held in trust for her personal representative as part of his or her personal estate. The effect of such a provision as that has

(1) 113 L. T. 152.

(2) [1894] A. C. 83, 95.

(3) (1888) 40 Ch. D. 159.

(4) [1912] 1 Ch. 392, 396.

(5) (1881) 19 Ch. D. 612.

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been clearly established by two authorities, to which I have been referred. One, which was a decision of the Master of the Rolls, Sir John Romilly, is *Long v. Watkinson*. (1) In that case the headnote is this: "Where a bequest is made by A to the executors of B, such executors hold it in trust, and to be administered as part of B's assets. The persons who take it beneficially take as cestuis que trust and not as personae designatae, and it may belong either to the creditors, or the pecuniary or residuary legatee or next of kin of B, according to the circumstances." The Master of the Rolls in his judgment says (2): "The question then remains, on what trusts does the executrix of Mrs. Fowler hold the property? I think she holds it to be administered by her according to the trust of her office, that is, I consider it as forming a part of the property which came to her hands as the executrix of Mrs. Fowler, and that it is to be administered by her as if it formed part of the property of Mrs. Fowler. It is the same as if the testator had said, 'Let the residue of my estate be administered in the same manner and upon the same trusts, as if it formed a part of my sister's estate.' The result is that, in my opinion, the contest, whether the residuary legatee or the next of kin take the property is, in many cases, a contest arising from a misapprehension of the character in which the executor or executrix takes the property. The executor or executrix, who takes the property, does so as a trustee, and the person who takes the property beneficially takes it as a cestui que trust, and not as a persona designata. It is, in my opinion, inaccurate to lay down as a rule, that, in such cases, the fund belongs either to the residuary legatee or to the next of kin; it belongs to the persons who are interested in the estate of the person to whose executor it is given. This disposition, therefore, will in some cases give the fund to the creditors, in others to the pecuniary legatees, in others to the residuary legatees, and in others to the next of kin."

The other decision, which is to the same effect, is *Lord Advocate v. Bogie*. (3) In that case it was a question of

(1) 17 Beav. 471.

(2) Ibid. 473.

(3) [1894] A. C. 83.

duties. It is not necessary to read very much of the facts of that case, but I desire to refer to two passages in the speech of Lord Herschell and a short passage in the speech of Lord Watson. In that case the facts were these: "This action was raised by the Lord Advocate, the appellant, as representing the Crown, against William Bogie and others, executors of Robert Methven's will, the respondents, claiming inventory duty—as it is called in Scotland, which is equivalent to probate duty in England—and legacy duty upon a third share (about 5000*l.*) of residue of the estate of a lady called Miss Scott. The duties were claimed as payable under the different statutes imposing liability, and particularly under the Acts 23 Vict. c. 15, s. 4, and 8 & 9 Vict. c. 76, s. 4, and were in addition to the inventory duty, or probate duty, and legacy duty already paid by Miss Scott's executors. The material words of Miss Scott's will were: 'With regard to the free residue of my whole moveable means and estate of every description,' after payment of debts and legacies, 'I leave and bequeath the same to Robert Methven, Robert Russell, and James Russell equally between and amongst them, share and share alike, for their own use and behoof, and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees.' Robert Methven predeceased Miss Scott. He died on the 3rd of April, 1887. Miss Scott died on the 20th of July, 1888. Her will was dated the 2nd of September, 1882. Robert Methven left a will dated the 21st of January, 1885, with codicil dated the 4th of October, 1886, appointing the respondents his executors, and they are now administering his estate, of which the residue was to be divided among certain charities after the death of his brother, which took place on the 24th of July, 1890." The question was whether the duty had to be paid on the estate of Robert Methven. Lord Herschell said this in the passage to which I wish to refer (1): "The will of Miss Scott, as I have said, must be taken as speaking from the time of her death; and the case appears to me to be precisely the

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same as if she in her lifetime had given the money to the executors of Methven to be used by them as executors in the same way as the other money which came to them as executors ; I cannot think that there is any difference, because she made this disposition by will, and in her will had made Robert Methven himself a beneficiary in case he had survived her. One must look at the state of things at the time from which the will speaks.

“ Now, I think that the effect of her disposition was so to vest this money in the persons who were to administer Robert Methven's estate, that they would have to administer it precisely as if it were part of Robert Methven's estate. I will go so far as to assume that, so far as it was possible for her to do so, she made it a part of his personal estate. But admitting all that, it does not follow that the legal effect of what she did was to make it for the purposes of this statute that which it really was not, a part of ‘ the personal estate of the deceased,’ which *prima facie* means the personal estate which has been his. For many purposes it would no doubt be regarded in precisely the same way. The learned Lord Advocate said that the question was whether it was impossible for her to make it so. It seems to me, however, that the question rather is whether what she has done necessarily has the effect of making it a part of the personal estate of the deceased within the meaning of the statute. If it has, of course the duty follows ; but I cannot think that this is the result. It appears to me that the effect cannot be said to be more than this ; it is to be held by the same persons and administered in the same way and dealt with altogether as if it were part of the personal estate ; but I do not think that makes it, or could make it, part of the personal estate within the meaning of this statute.” Then Lord Watson in a very short judgment sums the whole matter up in a comparatively few words. His Lordship says (2) : “ I do not think it is necessary to speculate how far she could have accomplished the object of making the Crown entitled to these duties by indicating that her bequest was to be in the same position under these statutes as if it had in point of fact belonged to

(1) [1894] A. C. 83, 91.

(2) [1894] A. C. 83, 95.

the nephew who predeceased her. I am satisfied that no such thing was either done or attempted here. Miss Scott created, according to my view, a new trust in the persons of Methven's executors, the purpose of the trust being, not that the fund which she committed to them should become part and parcel of the deceased's estate, but that it was to be administered by the trustees as a separate estate, in the same manner and subject to the same conditions as if it had originally been the property of Methven himself."

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As I understand that decision and the speeches in the House of Lords, which I have read, when the testator in this case gave a share of residue in the events which have happened to Catherine Sarah Cousen or if she did not survive to her legal personal representatives, it was as though he had said: "In the event of Catherine Alcock predeceasing me then her share of the residue is to be held by her legal personal representatives on the same trusts on which they hold her personal estate but not so as to make it part of Catherine Alcock's estate but as though the words were written out in the Cousen Will and the property was held as part of the Cousen Estate to be distributed in accordance with the directions of the Cousen Will, which is by reference to the dispositions of Mrs. Alcock with regard to her own property."

That, in my judgment, is the effect of those decisions. In no sense does the share of residue which Mrs. Alcock would have taken if she had survived become part of her estate; it is part of the Cousen estate given to Mrs. Alcock's legal personal representatives to be held by them upon the same trusts as Mrs. Alcock's property was held, with the result, as appears from the case in the House of Lords, that there would be no further duty to be paid other than the duty on this legacy given under this will to the persons in question. It is not suggested, and could not be suggested, having regard to the authorities, that the legal personal representatives of Mrs. Alcock take beneficially; quite plainly they do not, they take as personal representatives, as trustees of her property, the share of the residue upon trust for the persons entitled.

That being so there then comes this difficulty. Mrs. Alcock,

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as I have said, predeceased the testator James Cousen. On Mrs. Alcock's death the person who became her legal personal representative and the person who became beneficially entitled to the whole of her estate was her husband, William Alcock. William Alcock did not survive the testator James Cousen. If, therefore, I read the gift in the will as though it were a gift to Mrs. Alcock if she was living at his decease, or, in the event of her death, to William Alcock her husband, he being the person, as she died intestate, beneficially entitled to her estate, it must follow, in my judgment, there is a lapse and that that portion of the estate of Cousen is undisposed of. But it is said that is not the true result ; it is argued that the will of James Cousen can only speak from his death, and that I must therefore see who at his death were the persons then entitled to the estate of Mrs. Alcock, and since her estate passed beneficially to her husband, William Alcock, and he disposed of it as part of his estate, whoever is entitled under his will to his estate is now entitled to take under this gift.

That contention is not, I think, in accordance with the decision of Sargant J., to which I have been referred, in *In re Bosanquet*. (1) In that case the testatrix " Catherine Frances Dashwood by her will, which was dated the 18th July 1901, appointed executors, and, after giving two pecuniary legacies of 400*l.* each, bequeathed the sum of 1600*l.* free of duty to her trustees upon trust to invest the same in or upon any security or securities authorised by law for the investment of trust funds, with power from time to time to vary such investments and to stand possessed of one moiety of such sum (upon certain trusts immaterial to this summons). And she directed her trustees to stand possessed of the other moiety of such sum of 1600*l.* and the investments for the time being representing the same in trust to pay the income thereof to her sister the defendant Sophia Dashwood during her life, and after her decease in trust for the said testatrix's nephew the Hon. Claud Henry Manners absolutely ; and as to all the residue and remainder of her real and personal estate and effects and all property which she had and should or might have power to

(1) 113 L. T. 152.

appoint or dispose of by will the said testatrix gave, devised, bequeathed, and appointed the same to the defendant Maud Dominica Mary Petre for her own absolute use and benefit. Catherine Frances Dashwood died on the 21st May 1911, and her said will was duly proved, but her estate was insufficient for payment in full of legacies bequeathed by her said will, and the same had to abate accordingly. Only about 460*l.* was available for and was invested in part satisfaction of the trust legacy or second moiety of the said sum of 1600*l.* bequeathed by the will in trust for Sophia Dashwood during her life, and after her death in trust for the said Claud Henry Manners.

“ Claud Henry Manners died on the 6th July 1913, and the defendant Dame Lydia Sophia Manners is his personal representative.

“ Louisa Elizabeth Bosanquet, sister of Catherine Frances Dashwood, by her will, dated the 16th March 1911, bequeathed, amongst other legacies, one to Catherine Frances Dashwood ”—she was the original testatrix—“ as follows : ‘ The sum of 1000*l.*, but should the said Catherine Frances Dashwood die in my lifetime, I direct that the said legacy of 1000*l.* shall be paid to the personal representative or representatives of the said Catherine Frances Dashwood as part of her personal estate.’ Louisa Elizabeth Bosanquet died on the 9th February 1914, and her executors were prepared to pay over the 1000*l.*, and so this summons was taken out to decide who were entitled to it.” Sargant J. in his judgment said this (1): “ The material dates are as follows : Miss Dashwood’s will was made on the 18th July 1901. Mrs. Bosanquet’s will was made on the 16th March 1911. Miss Dashwood died on the 21st May 1911. Mr. Claud Henry Manners, the legatee in reversion, died on the 6th July 1913. Mrs. Bosanquet died on the 9th February 1914.

“ The effect of Mrs. Bosanquet’s will seems to me indistinguishable from that stated in *Long v. Watkinson* (2) and from that stated in *Lord Advocate v. Bogie*.” (3) Then he reads the passage from Sir John Romilly’s judgment,

(1) 113 L. T. 153.

(3) [1894] A. C. 83, 95.

(2) 17 Beav. 471, 474.

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and the passage in Lord Watson's speech, which I have read, and proceeds: "Under Mrs. Bosanquet's will, therefore, an additional fund was created for the purpose of being applied for the benefit of the various beneficiaries under Miss Dashwood's will, including Mr. Claud Henry Manners, as if that additional fund had formed part of the estate of Miss Dashwood. And if the gift by Mrs. Bosanquet had been by deed, the title of Mr. Manners would have been complete. But, unfortunately for him and his representatives, the instrument of gift was a will, and the gift was accordingly subject to the incidents of a testamentary gift. It was obviously liable to be altered or revoked by any fresh testamentary disposition on the part of Mrs. Bosanquet, and I see no reason why it was not also liable to the risk of failure or lapse incident to such gift in the event of the death of the legatee between the date of the will and the death of the testatrix." He held accordingly that the 1000*l.* went to the residuary legatees, because the gift, so far as it was a gift for the benefit of Claud Henry Manners, lapsed by reason of the fact that he had died before the death of Mrs. Bosanquet, the testatrix, although he had survived the original testatrix, Catherine Frances Dashwood. In that case, although Claud Henry Manners was excluded by the doctrine of lapse from taking any benefit under the will of Mrs. Bosanquet, there was nothing to prevent a benefit given by Mrs. Bosanquet's will falling into and forming part of the residuary estate of Mrs. Dashwood and going accordingly to the person entitled to her residuary estate. As I understand that decision, what Sargant J. is saying is: "You have to look at the gift as a gift given by the will of the testatrix to the persons named in the first testatrix's will, but they take as beneficiaries under Mrs. Bosanquet's will, and therefore only those persons can benefit under Mrs. Bosanquet's will who survived her."

Finally I will read one passage in a judgment of Parker J. in *In re Greenwood*. (1) I need not read the headnote or the whole of the judgment, because the case differs from the one which I am considering, but there is one passage to which I wish to refer. The learned Judge in his judgment said

(1) [1912] 1 Ch. 392.

this (1): "In construing a gift of this nature it must be remembered that the general law does not allow a legatee who predeceases the testator to take any benefit under his will. In that event the gift is said to lapse, with the consequence that it falls into residue, or if it is itself a share of residue, goes to the testator's next of kin. It is not competent to a testator to exclude the application of this rule of law, but the consequences of a lapse can be avoided by the substitution of some other legatee to take the legacy if the event which occasions the lapse occurs."

Under those circumstances, and bearing those principles in mind, the question here resolves itself into a question of construction of this particular will. The testator undoubtedly has endeavoured, and has succeeded up to a point, in avoiding the rule of lapse because he has provided that if the person or persons who would have taken directly under the will, that is in this case Mrs. Alcock, predeceased him, the benefit which that person would have taken is to go to that person's legal personal representative as part of his or her personal estate. The question then is: How are those last words to be read? In my judgment, according to the authorities to which I have referred, I must read them as a gift to Mrs. Alcock or, in the events which have happened, to the person who became entitled on Mrs. Alcock's death to her estate, that was her husband, William Alcock. William Alcock did not survive the testator, James Cousen, and since there is nothing in Cousen's will which provides against the lapse which must result if the person who is substituted for Mrs. Alcock as legatee predeceases the testator, it must follow that that portion of the estate of James Cousen has not been effectively disposed of.

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Solicitors: *Maude & Tunncliffe, for J. C. Dacre, Otley, Yorks; Batchelor, Pirkis & Fry, for Mumfords & Gordons, Bradford; Kingsford, Dorman & Co.*

(1) [1912] 1 Ch. 392, 396.

P. J. B.

SIMONDS
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In re CUTHBERT COOPER AND SONS, LIMITED.

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[00160 of 1937.]

*Company — Winding-up — Private company—Transfer of shares—
Directors' power to refuse registration—Refusal to register executors of
deceased shareholder holding half the shares—No ground for making
winding-up order—Companies Act, 1929 (19 & 20 Geo. 5, c. 23),
s. 168.*

A private company was formed in 1913 with a capital of 10,000*l.* in 1*l.* shares, half of which belonged to C. C. and half to his two elder sons. C. C. and his two elder sons were the first directors of the company and continued to be so until 1930, when C. C. died, leaving his two elder sons sole directors. By his will C. C. appointed his three younger sons, who were employed in the business but were not members of the company, executors thereof and bequeathed his 5000 shares equally between them.

The articles of the company provided that the directors might in their absolute discretion refuse to register any transfer of shares, and without assigning any reason for such refusal, and that this power should extend to the registration of the personal representatives of a deceased shareholder. The directors refused to register the executors in their capacity of beneficiaries under the will as members of the company. Subsequently the directors dismissed the executors from their employment with the company and refused to supply them with copies of the balance-sheet and accounts for the year ending June 30, 1936.

The executors presented a petition for the winding-up of the company on the ground that in the circumstances above stated it was just and equitable that the company should be wound up :—

Held, that though the principles applicable to the case were those which would be applied in an action for dissolution of partnership, there were no grounds shown in the petition on which it would be "just and equitable" within the meaning of s. 168 of the Companies Act, 1929, to make a winding-up order.

PETITION.

The company, Cuthbert Cooper & Sons, Ltd., was registered as a private company in August, 1913, to acquire and carry on the business of boot-rivet and button-fastener manufacturers then being carried on by Cuthbert Cooper and his two elder sons, George Cooper and Charles Cooper, at Darnall, Sheffield. The capital was 10,000*l.* in 1*l.* shares, of which Cuthbert Cooper held 5000 shares and his two sons 2500 shares each. The first directors of the company were Cuthbert Cooper and his two sons.

Cuthbert Cooper died on August 11, 1930, having by his will dated May 5, 1927, appointed his three younger sons, the petitioners, Cuthbert Cooper the younger, Stanley Cooper and Colin Cooper, executors thereof, and bequeathed his shares in the company to them in equal shares. The will was proved by the executors on November 21, 1930, and the probate was registered in the books of the company. The executors as beneficiaries under the will applied to the two elder sons of the testator, now the sole directors, to be registered as members of the company in respect of their shares, but the directors consistently refused to register them as such and declined to give any reasons for their refusal. In 1936 the three younger sons, who were all employed by the company, were dismissed from their employment, and since then had endeavoured to set up in business as competitors of the company. The directors also refused to supply them with any copies of the balance-sheet and accounts for the year ending June 30, 1936. The younger sons presented this petition for winding-up the company, and alleged that on the above facts it was just and equitable that the company should be wound up.

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The following articles of association of the company were material :—

Art. 26. The directors in their absolute uncontrollable discretion may refuse to register any transfer of shares including fully-paid shares without assigning any reason therefor, and in particular they may decline to register the transfer of any share on which the company has a lien.

Art. 28. No share shall be transferred to a person who is not a member so long as any member is willing to purchase the same at a price to be fixed as hereinafter provided.

Art. 29. In order to ascertain whether any member is willing to purchase a share, the person, whether a member of the company or not, proposing to transfer the same shall give notice in writing to the company that he desires to transfer the same, and such notice shall constitute the company his agent for the sale of the share to any member of the company. The transfer notice may include several shares, and in such

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case shall operate as if it were a separate notice in respect of each. The transfer notice shall not be revocable except with the sanction of the directors.

Art. 33 provided for the ascertainment of the price to be paid for every share so sold, to depend on the average rate of dividend in the three preceding years.

Art. 36. Any person becoming entitled to a share in consequence of the death, bankruptcy or liquidation by arrangement of any member may subject as herein or otherwise provided, upon such evidence being produced as may from time to time be required by the directors, either be registered himself as holder of the share, or elect to have some person nominated by him registered as the transferee thereof.

Art. 37. If the person so becoming entitled shall elect to be registered himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects. For all purposes of these presents relating to the registration of transfers of shares, such notice shall be deemed to be a transfer, and the directors shall have the same power of refusing to give effect thereto by registration as if the event upon which the transmission took place had not occurred, and the notice were a transfer executed by the person from whom the title by transmission was derived.

Art. 38. If the person so becoming entitled shall elect to have his nominee registered, he shall testify his election by executing to his nominee a transfer of such share.

Art. 39. Nothing contained in these articles shall restrict the exercise in any case of the discretion given to the directors to refuse to register a transfer under Article 26.

Art. 40. A person entitled to a share by transmission shall be entitled to receive and may give a discharge for any dividends bonuses or other moneys payable in respect of the share, but he shall not be entitled to receive notices of, or to attend or vote at meetings of the company, or save as afore-said, to any of the rights or privileges of the members unless and until he shall have become a member in respect of the shares.

Charles Harman K.C. and *Cecil W. Turner* for the petitioners. The executors of a deceased shareholder are entitled to present a petition for the winding-up of the company. For the present purpose they are contributories, who under s. 158 of the Companies Act, 1929, include any person alleged to be a contributory. See *In re Norwich Yarn Co.* (1), where Lord Langdale M.R. held that executors, although under the deed of settlement constituting the company not proprietors of the company, were contributories and entitled to present a petition under the Winding-Up Acts, 1848 and 1849; *In re Leeds Banking Co. Fearnside & Dean's Case* (2); *In re Patent Steam Engine Co.* (3); Companies Act, 1929, s. 170, sub-s. 1 (a). What the petitioners claim is a proper realization of the assets of the company. At present they hold half the capital of the company, but are treated by the directors as having no rights at all. The directors have consistently refused to register them as shareholders of the company, and have also refused to let them see the last balance-sheet and accounts of the company. The petitioners have offered to sell their shares at a properly ascertained price, but that offer has been refused. The directors have offered to purchase them at 1*l.* 10*s.* per share, a price very much less than their real value. The company is substantially a partnership, and the principles of partnership law should be applied to the case, and the only remedy is to petition the Court for a winding-up order: *In re Yenidje Tobacco Co.* (4) The petitioners, who are entitled to a half-share, have been excluded from the business by the persons entitled to the other half: *In re Davis & Collett, Ltd.* (5). And see Stiebel's Company Law, 3rd ed., vol. ii., at p. 759.

The petitioners are entitled to receive the balance-sheets of the company under s. 130 of the Act. The case is one where it is "just and equitable" that the company should be wound up within the meaning of s. 168 of the Act.

D. Ll. Jenkins for the company. The petition is entirely

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(1) (1850) 12 Beav. 366.

(2) (1865) L. R. 1 Ch. 231.

(3) (1878) 8 Ch. D. 464.

(4) [1916] 2 Ch. 426.

(5) [1935] Ch. 693.

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misconceived. The petitioners are not members of the company, but personal representatives of a deceased member, with such rights only as the articles give them. The directors have acted within their rights and powers under the articles, which give them an absolute uncontrollable discretion to refuse registration of any transfer of shares. There is no case of deadlock, and nothing to prevent the directors from carrying on the business of the company at a profit, as they are doing. There is no evidence that they have not acted bona fide, or with any ulterior motive. If the petitioners have any grounds of complaint against the directors, those would properly form the subject of an action in the Chancery Division, not a petition in the Companies Court. If the petitioners do not accept the price offered for the shares by the directors they have power to sell them elsewhere at the price fixed by the articles.

As to the dismissal of the petitioners from their employment by the company, it was not unreasonable, as they were threatening to set up in business as competitors of the company. The petitioners' remedy is an action for wrongful dismissal.

The directors did not see fit to declare a final dividend for the year ending June 30, 1936, and their action was perfectly bona fide. No ground has been shown for making a winding-up order.

Harman K.C. in reply. We ask the Court to exercise its general equitable jurisdiction. The test in a case like the present one is not fraud, which is not alleged, but a breach of the directors' fiduciary duty: *Harris v. A. Harris, Ltd.* (1), per Lord Murray. The petitioners do not complain that they get no control, but that at present they have been refused accounts. They have a right to know how the affairs of the company are being conducted. They cannot sell their shares at a fair price to the directors, and no one else would buy them in the circumstances.

SIMONDS J. This is a case which has given me some anxiety, largely because it is of an unusual character. The

petition is to wind up a company called Cuthbert Cooper & Sons, Ltd. That company was incorporated in August, 1913, it had a share capital of 10,000*l.* divided into 10,000 shares of 1*l.* each, and its main objects were to acquire and carry on the business of a boot-rivet and button-fastener manufacturer, formerly carried on under the style of Cuthbert Cooper & Sons. The company was formed by Mr. Cuthbert Cooper and his two sons. They were the first directors—Mr. Cuthbert Cooper the father, and his two elder sons, George Cooper and Charles Cooper. The share capital was originally allotted as to 5000 shares to the father, Cuthbert Cooper, and as to the remaining 5000 shares to his two elder sons equally.

The father's shares remained in his possession until his death. He died on August 11, 1930, having by his will, which was made in 1927 and proved shortly after his death, appointed as his executors his three younger sons, one of them also called Cuthbert Cooper, and the other two Stanley Cooper and Colin Cooper, to whom also he bequeathed his shareholding of 5000 shares in this company in equal shares.

It is necessary to look at the articles of association of the company to see what were the rights of the executors on the death of their father. The company was a private company which contained particularly stringent provisions with regard to the transfer and transmission of shares. Article 26 provided that the directors in their absolute uncontrollable discretion might decline to register any transfer of shares, including fully-paid shares, without assigning any reason therefor. That power of veto extended not only to transfers *inter vivos*, but also to the devolution of shares on the death of a holder to his executors, so that with regard to executors as well as to other transferees the directors had a power of absolute veto. The directors at all material times were the father and his two sons, and on the father's death the two sons remained as sole directors.

In the event of the directors refusing to register a transfer these courses were open to the executors of a deceased holder. They were in a position, if they thought fit, without being

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SIMONDS J. put on the register, to receive those very limited rights which the articles gave them—the rights to receive dividends and rights in a winding-up to such a return as their testator would have been entitled to, and I think no others. If they were not satisfied with that position, they were thrown back on the provisions of the articles which enabled them to transfer their shares, which meant this. If they could find a member of the company who would purchase, they could sell. If they could not find such a member, they had to employ the somewhat elaborate machinery of the articles giving their sale notice in the ordinary way. I need not refer to it. If no member took up the notice, then they were in a position to sell to an outsider, but subject always to the qualification which the articles imposed that as to that person also the directors might exercise their veto. That was the position, as a matter of bargain entered into by their testator with those others, his sons, who had joined him in forming the company, in which the executors found themselves on the death of the testator.

It has been pressed on me in considering this case that I am to be guided by the principles which influence the Court in determining whether or not a partnership shall be wound up. I propose faithfully to follow that injunction, laid down as it is by the Court of Appeal in *In re Yenidje Tobacco Co., Ltd.* (1) and followed recently in *In re Davis & Collett, Ltd.* (2) by Crossman J. Whether it be a matter of articles of association or articles of partnership the rights of the parties are determined by those articles, and the question whether it is right for me applying here the principles of partnership to the question of dissolution to wind up this company or not largely depends on what are the contractual rights of the parties as determined by the articles of association in this case. Accordingly, when I come to consider the allegations which are made in the petition, I must be guided by what are the legal rights of the parties as determined by the bargain into which they entered.

That being the position, and the testator having died in

(1) [1916] 2 Ch. 426.

(2) [1935] Ch. 693.

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1930, the three sons registered the probate of the testator's will in the books of the company, but they were not registered, and consistently the directors have refused to register the sons as members of the company.

Before I consider further the facts of the case let me say this. I am going to assume, without deciding it, that the executors of a deceased shareholder holding fully-paid shares are contributories within the meaning of the section of the Act which authorizes the presentation of a petition for winding-up. Some authority for that proposition is to be found in *In re Norwich Yarn Co.* (1), a decision on earlier Acts, and I will assume without deciding it that the position is the same under the present Act. I think that a good deal might be said on the one side or the other. The executors, then, as contributories, bring this petition, not having been registered as members of the company.

For the purpose of determining whether the petition should be granted or not, it is necessary for me to look at the allegations in the petition, and I do not propose to travel beyond them. The first allegation, the first grievance under which the petitioners labour, and which is made a ground for asking me to exercise the jurisdiction of the Court and to say that it is just and equitable to wind up the company, is this, that the directors have consistently refused to register the petitioners as members. For the purpose of exercising this jurisdiction I am not going to assume that that discretion of the directors has been improperly exercised.

There is no evidence before this Court that it has been improperly exercised, and I should not be justified in assuming that it has been improperly exercised. That is not a ground on which this Court can exercise its jurisdiction to wind up the company. I will neither assume that that discretion has been improperly exercised, nor will I assume that, if it was improperly exercised, the petitioners could not get the appropriate relief in the appropriate proceedings, which would either be by motion to rectify, or more properly, I think, since there would be disputed questions of fact, and

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(1) 12 Beav. 366.

SIMONDS J. perhaps an occasion for interrogatories or discovery, an action in the ordinary way in the Chancery Division. But, at least on a petition, I am not going to exercise my jurisdiction to wind up a company on that ground, on the footing that it is for that reason just and equitable.

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The next allegation in the petition is that at a certain date, 1936—for all those years between 1930 and 1936 the three petitioners had been employed by the company—the petitioners were summarily dismissed. That is no ground, whether taken by itself or taken in conjunction with the other facts alleged, for winding up the company. There was no obligation to employ the petitioners. If they have been employed, and if they have been improperly dismissed, then that is a matter in respect of which they can seek relief in the appropriate Court.

It is then said that the directors have refused to supply them with copies of the balance-sheet for the year ending June 30, 1936. The directors were under no obligation to supply them with the balance-sheet; their contractual rights as provided by the articles did not compel the directors to supply them with balance-sheets, and, for reasons which may or may not be adequate, the directors thought fit in the year 1936 not to supply them with a balance-sheet. I say no more about that, and I see no reason in that for winding-up the company.

In para. (9.) a number of allegations are made relating to the salaries which the directors have received. No doubt they were masters of the situation, and they paid themselves what salaries they thought fit. Allegations are made that they have paid themselves certain salaries, but there is not the allegation, much less the proof, that the certain salaries which were paid, and in addition the bonuses, were excessive, or were paid in ill faith. I should be travelling altogether outside the allegations in this petition if I allowed counsel for the petitioners on those allegations to suggest anything in the nature of ill faith at all.

I now come to this point, with which I want to deal. Mr. Harman, for the petitioners, when the matter was first

mentioned yesterday, asked that the case should stand over with a view to the cross-examination of the deponent directors. That was objected to by Mr. Jenkins on the ground that the petition itself was altogether misconceived, and that it inflicted injury on the company for the petition to remain on the file a moment longer than was necessary. In the circumstances I decided to go on with the petition and to allow, if I thought fit at a later stage, the cross-examination of the deponents. It appeared to me to be plain as the matter went on that it must be confined to the allegations in the petition, and therefore I did not allow Mr. Harman to go outside it and cross-examine the witnesses on matters which were not of substantive allegation in the petition. Accordingly it rests on the allegations in the petition, and such evidence as I have heard.

As I have already said, para. (9.) contains a number of allegations which do not appear to me to afford any ground whatever for winding-up this company. There is the suggestion, and again nothing more than the suggestion, that the petitioners, being relegated to their rights under the article of serving sale notices, may suffer because the dividends—it is the dividends which determine the price—have been reduced in the last year of the company's operations. It appears that the dividend has been reduced, but there is no allegation, much less proof, that the dividend has been unduly reduced to invade the rights of the petitioners.

In the view to which I have come on the facts of this case I hold that the petition is misconceived. I should be travelling altogether outside any case in which a winding-up has been decreed by the Court if, in circumstances such as these, I held that it was just and equitable to wind up the company. Accordingly I dismiss this petition, with costs.

Solicitors : *Sharpe, Pritchard & Co., for H. Shelley Barker & Son, Sheffield ; Biddle, Thorne, Welsford & Gait, for Wake, Smith & Fielding, Sheffield.*

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DROWN *v.* GAUMONT-BRITISH PICTURE
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March 23, 24;

April 6, 7,
8, 9.

[1937. D. 413.]

*Company—Reserve fund consisting partly of premiums on shares—
Payment of dividend out of reserve fund.*

There is no principle of law which prevents a company from paying dividends out of assets representing premiums received on the issue of shares.

MOTION.

By this motion the plaintiff, Mr. William Henry John Drown, a shareholder in Gaumont-British Picture Corporation, Ltd. (hereinafter called "the company"), asked, on behalf of himself and all the other shareholders in the company, for an order that the company and its directors might be restrained, pending the trial of the action, from paying, in respect of the financial year ending March 31, 1937, a dividend on its five and a half per cent. cumulative first preference shares of 1*l.* each, on the ground (among others) that the losses of the company had so greatly reduced the profits available for dividend that the proposed dividend would, if paid, be paid out of capital.

From time to time during the company's history shares were issued at a premium and the premium was from time to time carried to reserve. On March 31, 1936, there existed a balance carried to reserve of 500,000*l.*, built up partly from premiums on the issue of shares. It appeared from the figures before the Court that the dividend could not be paid without utilizing the greater part of this reserve of 500,000*l.* It was contended on behalf of the plaintiff that so much of the reserve as represented premiums on shares could not properly be treated as profits of the company available for dividend.

The case is reported on this point only.

Harold Christie K.C. and *J. G. Strangman* for the plaintiff.

Sir William Jowitt K.C., *Cyril Radcliffe K.C.*, and *T. D. D. Divine* for the company.

CLAUSON J. [having stated the facts and his findings on them:] The reserve fund was built up to a great extent out of premiums on shares, and it was suggested that there is some special feature about the money which has been obtained by way of premium upon the issue of shares which as a matter of principle prevents that money being dealt with as available to pay a dividend. I am not aware of any such feature or of any such principle, nor can I see any ground on which such a principle can be established. I can well appreciate that if moneys which have been obtained by way of premium on the issue of shares are set aside in some particular fund, and that particular fund has disappeared, it may properly be said that the premium has disappeared, and is no longer available for distribution. If, however, the premium has become a part of the general assets of the company I do not see what justification the Court would have for treating such part of those assets as represents the premium as on a different footing from the rest of those assets, or for treating a reserve formed by setting aside the premium as on any footing different from that of a reserve set aside out of what one may for convenience call normal profits. Subject always to anything in the articles of association to the contrary, there is nothing legally wrong, so far as I am aware, in a company dividing among its shareholders a premium obtained on the issue of shares. The premium from its very nature is not part of the capital paid up on the shares; it is the surplus of the sum received in respect of the share over the amount required to pay up the share to the extent to which it is treated by the company as paid up. The capital paid up on the share must not be divided in dividend: but the premium is not capital paid up on the share but a sum received by the company in excess of the capital paid up on the share: and the principle that capital paid up on the share must not be divided in dividend is in no way infringed by distributing the premium in dividend.

[His Lordship held that on the evidence before him the plaintiff had failed to discharge the onus of proving that by the payment of the proposed dividend the directors would

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CLAUSON J. be trenching upon so much of the assets of the company as properly represented the capital paid up on the shares, and dismissed the motion with costs.]

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Solicitors : *Nordon & Co. ; Lawrance, Messer & Co.*

K. R. A. H.

In re E. J. CASSE.

LUXMOORE
J.

Ex parte G. H. ROBINSON v. THE TRUSTEE.

1937

April 19;
May 3, 4.

Bankruptcy—Deed of Arrangement with creditors—Debtor an assignee of a Lease—Covenant of indemnity with assignors—Covenant of indemnity by Assignors with the original lessees—Whether one of the assignors to debtor entitled as a creditor under Deed of Arrangement—Bankruptcy provisions not incorporated—Construction of Deed of Arrangement—“Is indebted”—“creditors,” “debtor,” “debtis.”

C., a debtor, in October, 1936, entered into a deed of arrangement with his creditors under which a certain lease—of which he was an assignee—was not assigned but was to be held by him on trust for the trustee of the deed. In the assignment of the lease to C. there was a covenant by him with the assignors (who were the applicant and one D.), and with each of them to pay the rent and perform and observe the covenants on the part of the lessee and to keep the assignors effectually indemnified against all actions claims and demands whatsoever by reason or on account of the non-payment of the rent or the breach, non-performance or non-observance of the covenants or conditions or any of them. The lease had been assigned to the applicant and D. by the original lessees, and in the deed of assignment to the applicant and D. there was a covenant with the original lessees to the effect that the covenants implied by the Law of Property Act, 1925, s. 77, sub-s. 1, para. (c), should be incorporated in the deed—namely (inter alia) at all times to perform and observe the covenants contained in the original lease, and to keep the original lessees indemnified in respect of any breach of such covenants. The applicant had assented to the deed of arrangement entered into by the debtor with his creditors, but the deed did not contain any provision, in the trusts for the distribution of the debtor's property among the creditors, incorporating the bankruptcy provisions relating to the distribution of the property and assets of a bankrupt.

The applicant claimed to be a creditor of the debtor under the terms of the deed of arrangement. He alleged that he might be called upon by virtue of the covenants incorporated in the assignment to him to indemnify the original lessees (the assignors to him) against any liability they might be under to the lessors, and that, if he were to be so called on, the debtor in his turn would be liable to indemnify him, and claimed that such a contingent liability on the part of the debtor was a “debt” within the meaning of the deed of arrangement, and that he (the applicant) was a “creditor” of the debtor within the meaning of the deed in respect thereof:—

Held, that there was nothing in the deed of arrangement which would enable the Court to construe the words “creditors,”

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"debtors" or "debts" in the deed in any wider sense than was ordinarily attributed to those words in order to bring any one who might have a contingent or future claim against the debtor within the scope of the deed. The motion therefore would be dismissed.

MOTION IN BANKRUPTCY.

On October 15, 1936, the debtor. Edwin Joseph Casse, executed a deed of assignment for the benefit of his creditors. The trustee of the deed was a Mr. Leonard Stanley Grigg. By it the debtor assigned to the trustee substantially all his property except (*inter alia*) all property of leasehold tenure belonging to the debtor. There was a provision in the deed that the excepted leasehold property was to be held by the debtor in trust for the trustee. The debtor possessed four rooms on the ground floor of Salisbury House, Finsbury Circus, in the City of London, for the unexpired residue of a lease dated March 12, 1925, and made between the Salisbury House Estate, Ltd., of the one part and three persons who carried on business in partnership together under the style of "Mawby, Barrie & Letts" of the other part. The term created by this lease was for twenty-one years and a fraction of a year from March 6, 1925, and was determinable by the lessees at their option at the end of the fourteenth year of the term. The yearly rent reserved by the lease was 700*l.*, and the lease contained repairing and other usual covenants on the part of the lessees. This lease was assigned on April 1, 1932, to Mr. Graham Henry Robinson, the applicant on the motion, and a Mr. Ernest Dunstan Dignasse. In this assignment there was a clause that the covenants implied by virtue of the Law of Property Act, 1925, s. 77, sub-s. 1, para. (c), should be incorporated therein. (1) These two persons carried on business together in partnership at the date of the assignment; but the partnership was dissolved in May, 1933, one of the

(1) Law of Property Act, 1925, s. 77, sub-s. 1: "In addition to the covenants implied under the last preceding section, there shall in the several cases in this section mentioned, be deemed to be

included and implied, a covenant to the effect in this section stated, by and with such persons as are hereinafter mentioned, that is to say:—

* * * * *

terms of dissolution being that the leasehold property referred to should be assigned to Mr. Robinson. No assignment was executed in his favour, but on October 19, 1933, by a deed of that date, the property was assigned to the debtor for the remainder of the term created by the original lease. In that deed the debtor covenanted jointly and severally with Mr. Robinson and Mr. Dignasse to pay the rent reserved by and perform and observe the covenants on the part of the lessee and conditions contained in the said lease and the covenant continued as follows: "and will at all times keep the vendors and their successors in title effectually indemnified against all actions and proceedings costs damages expenses claims and demands whatsoever by reason or on account of the non-payment of the said rent or any part thereof or the breach non-performance or non-observance of the said covenants or conditions or any of them."

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After the execution of the deed of assignment of October 15, 1936, the trustee entered into possession of the leasehold premises and carried on there the debtor's business which had been assigned to the trustee. In due course he sold this business to a purchaser who did not require the leasehold property. The trustee consequently gave up

(c) In a conveyance for valuable consideration, other than a mortgage, of the entirety of the land comprised in a lease, for the residue of the term or interest created by the lease, a covenant by the assignee or joint and several covenants by the assignees (if more than one) with the conveying parties and with each of them (if more than one) in the terms set out in Part IX. of the Second Schedule to this Act.
". . . ."

Second Schedule, Part IX.:
"That the assignees, or the persons deriving title under them, will at all times, from the date of the conveyance or other date therein stated, duly pay all rent

becoming due under the lease creating the term or interest for which the land is conveyed, and observe and perform all the covenants, agreements and conditions therein contained and thenceforth on the part of the lessees to be observed and performed:

And also will at all times, from the date aforesaid, save harmless and keep indemnified the conveying parties and their estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the said rent or any breach of any of the said covenants, agreements and conditions."

LUXMOORE possession of it, but he paid the rent which had accrued
 J. due in respect of the premises under the original lease
 1937 down to December 25, 1936. Notice was given to the
 CASSE, head-lessor terminating the lease on March 25, 1939, but
In re. the premises were, at the time of these proceedings, still
 unoccupied.

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J. B. Blagden for the applicant. Though the applicant cannot rely on the Bankruptcy Act, 1914, the debtor's affairs not having been wound up in bankruptcy, yet, having assented to the deed of assignment of October 15, 1936, he on the true construction of that deed can come in and prove as a creditor. It may also be that the bankruptcy provisions are incorporated in the deed as well. He is entitled to the benefit of the deed like any other creditor. It is submitted that he should be considered as a contingent creditor in that he is under a liability to the original lessees under the implied covenants for indemnity expressed to be contained in the assignment to him, and the debtor is under a contingent liability to indemnify the applicant. On the meaning of the word "creditor" see *Wood v. De Mattos*. (1)

Maurice Berkeley for the respondent. *Wood v. De Mattos* (1) was a decision under s. 192 of the Bankruptcy Act, 1861, and does not apply, because deeds of arrangement are now governed by the Deeds of Arrangement Act, 1914, and no longer by the Bankruptcy Acts, as when that case was decided. The bankruptcy rules do not apply in determining who is entitled to claim under a deed of arrangement, unless the deed in question so provides, as it did for example in *Baker v. Lloyds Bank*. (2) It is a question of construction in each case who is entitled to claim under a deed of arrangement. In this case the deed contemplates that a creditor must have been (a) a creditor at the date of the execution of the deed, and also (b) a creditor in respect of a debt due or owing at the date of the deed. The words "creditor" and "debt" are used in the ordinary sense. This contingent claim is not a "debt," and is certainly not "due or owing." See *In re*

(1) (1865) L. R. 1 Ex. 91, 100.

(2) [1920] 2 K. B. 322, 326.

Mitchell. Freelove v. Mitchell (1); *In re a Debtor* (2); *In re LUXMOORE J.*
Beavan, Davies, Banks & Co. v. Beavan (3) (an executor's
 right of retainer). Compare also *Israelson v. Dawson (Port of* ¹⁹³⁷
Manchester Insurance Co., Ltd., Garnishees) (4) (on the words
 "indebted to a debtor." See these words in the deed in the
 case now before the Court). Also the distinction between
 "debt" and "liability" in s. 30 of the Bankruptcy Act, 1914,
 should be noted and the elaborate definition contained in that
 section so as to confer a right to prove in bankruptcy in
 respect of a contingent claim.

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J. B. Blagden in reply.

LUXMOORE J. [after stating the facts continued:] The position is that Mr. Robinson as one of the mesne assignees is liable to be called upon by Messrs. Mawby, Barrie & Letts, the head-lessees, to indemnify them under the implied covenants contained in the assignment of April 1, 1932, against their liability under the head-lease in respect of the covenants to pay the rent and to observe and perform the covenants contained therein. I was told by Mr. Blagden in the course of the argument that Mr. Robinson has, since this motion was launched, been called upon so to do.

Mr. Robinson claims to be a creditor of the debtor and to be entitled to prove as such under the deed of assignment of October 15, 1936. No proof has been lodged by him and the reason for that is stated by him in para. 10 of his affidavit. He says: "I have not yet actually lodged a proof because until I know the trustee's decision as regards the future rent payable under the aforesaid indenture of lease the amount of such proof is difficult if not incapable of being fairly estimated, but assuming that no further rent is paid under the aforesaid indenture by the trustee or by the debtor the capitalized value of the rent for the remainder of the term is approximately 1627*l.* and I am informed and verily believe that dilapidations in the demised premises have occurred to the extent of about 200*l.* making the amount for

(1) [1913] 1 Ch. 201.

(2) Ante p. 156.

(3) [1913] 2 Ch. 595.

(4) [1933] 1 K. B. 301, 304, 306.

LUXMOORE which on the above assumption I claim to prove about 1827^l.
 J. Should it be possible to arrange with the landlords to accept
 1937 a surrender and a less sum I am ready and willing for my
 CASSE, proof to be reduced accordingly." The trustee declined
In re. to recognize Mr. Robinson as a creditor entitled to the benefit
 ROBINSON, of the deed of assignment of October 15, 1936, and
Ex parte Mr. Robinson accordingly launched this motion on February 1,
v. 1937, for, among other things, a declaration that he is entitled
 THE under and by virtue of the assignment of the leasehold property
 TRUSTEE. to the debtor dated October 19, 1933, to prove and receive
 — dividends under the deed of assignment of October 15, 1936,
 in respect of the debtor's liability to indemnify the applicant
 against any claims by the original lessors or by Messrs. Mawby,
 Barrie & Letts (the assignors to him) under their implied
 covenants. The motion also asks for other ancillary relief.

If the debtor's affairs were being wound up in bankruptcy, his liability to indemnify Mr. Robinson in respect of the covenants to pay the rent and perform the covenants contained in the head-lease would be provable in bankruptcy under the Bankruptcy Act, 1914, s. 30: see *Hardy v. Fothergill* (1). Mr. Blagden on behalf of Mr. Robinson has, however, quite properly admitted that the provisions of that Act do not apply except in so far as they may be incorporated in the deed of assignment; but he argues that having assented to the deed of assignment he is, on the true construction of that deed, a creditor of the debtor and consequently entitled to the benefit of it. At the date of the execution of the deed no claim had been made against Mr. Robinson in respect of the rent of the leasehold property or of any breach or non-observance of the covenants in the head-lease, the position being that Mr. Robinson was under a contingent liability to indemnify the original lessees (the assignors to him) in respect of these matters. It is true that the debtor had covenanted to indemnify him against any such liability, but there was not at law any debt owing by the debtor to Mr. Robinson.

I refer to the decision of Parker J. in *In re Mitchell. Freelove v. Mitchell* (2), where he said this: "Now, I have

(1) (1888) 13 App. Cas. 351.

(2) [1913] 1 Ch. 201; 206.

heard a good deal of argument on the nature of the right which a surety has against the principal debtor, and I may say at once that it appears to me that, until the surety is called upon to pay and does pay something under his guarantee, there is no debt or right at law at all; until then, a surety's right is confined to a right to come into equity in order to get an indemnity against his liability to the creditor. That, I think, has long been well-known law, and at any rate it is made reasonably clear by the case, recently before Swinfen Eady J., of *Ascherson v. Tredegar Dry Dock and Wharf Co.* (1) It is also true that Mr. Robinson would not have been entitled himself to present a bankruptcy petition against the debtor founded on this liability.

Mr. Blagden has argued that, as a matter of construction, Mr. Robinson is entitled to the benefit of the deed of assignment. It is therefore necessary to consider its form and terms. It is to be observed that there is no express provision such as is frequently to be found in deeds of assignment for the benefit of creditors incorporating the provisions of the Bankruptcy Act with regard to the administration and distribution of a bankrupt's property. A good example of a deed embodying such a provision is to be found in the case of *Baker v. Lloyds Bank, Ltd.* (2) In the absence of such a provision Mr. Robinson must rely solely on the terms of the deed of assignment. It is expressed to be made between the debtor of the first part, the trustee of the second part, and the several persons firms and companies being creditors of the debtor who should execute or assent in writing to the deed (thereinafter called "the said creditors") of the third part. Pausing there, it is to be remembered that at the time of the execution of this deed Mr. Robinson was not in the strict sense of the term a creditor of the debtor although he had or might be under a contingent liability in respect of which he was entitled to be indemnified by the debtor. The deed contains this recital: "Whereas the debtor is indebted to the creditors who claim from the debtor the sums of money set opposite their respective names in the

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(1) [1909] 2 Ch. 401.

(2) [1920] 2 K. B. 322.

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schedule hereto and has proposed and agreed to convey and assign all and singular his property and effects (except as hereinafter mentioned) unto the trustee upon the trusts and in manner hereinafter mentioned for the benefit of his creditors who have agreed to release him from his debts as hereinafter appears." The prima facie meaning of the words "is indebted" does not cover the relationship between Mr. Robinson and the debtor, nor is the word "debts" applicable to the particular liability. The recital is followed by the assignment of all the debtor's property with the exception, among other things, of the leasehold property. The first trust is a trust for sale and conversion and the trusts of the proceeds are to pay the costs of any sale and conversion and the costs incurred in the execution of the trusts. Subject to this the trustee is to pay "all claims which are by law entitled to be paid in full or in priority to other debts in case of bankruptcy and remain unpaid." The residue of the money is to be divided among all "the said creditors" rateably and in proportion to the amount of their respective debts until each of the creditors has received the full amount of the debt owing to him with interest thereon at the rate of 4 per cent. from the date of the deed. It is to be observed that the beneficiaries are "the said creditors," and there is a direct reference to the definition clause at the beginning of the deed. The payment is to be in proportion to their respective debts and there is no reference whatever in this clause to the bankruptcy law. A reference to the bankruptcy law, in addition to the reference to the preferential claims to which I have already referred, is to be found in clause 15. This clause relates to secured creditors and does not extend the meaning of the words "creditors," "debtors," or "debts" as used in the rest of the deed.

There is also a reference to the law of bankruptcy in clause 21, which provides for the calling of meetings and the appointment of new trustees. The only other clauses material to be considered are clauses 18, 19, 24 and 25. Clause 18 empowers the trustee to require any debt or debts due to or claimed by the creditors to be proved by statutory declaration

or otherwise as the trustee may think fit to prescribe. Clause 19 is an arbitration clause: it refers to the debt due to or claimed by a creditor. Clause 24 is the clause on which Mr. Blagden placed most reliance. It is in these terms: "This deed further witnesseth that in consideration of the conveyance and assignment hereinbefore contained the trustee and the creditors do hereby (subject to the proviso hereinafter contained) respectively release and for ever discharge the debtor and his estate and effects from all and singular the debts bills bonds notes accounts costs damages expenses judgments executions actions claims and demands whatsoever which they the said several persons parties hereto of the second and third parts respectively now have or shall or may or otherwise could or might hereafter have claim or demand of from or against the debtor or his estate or effects or either of them respectively on account of the debts and securities due or owing from the debtor and all interest for or in respect of the same or for or on account of any other thing relating thereto." The general words which are to be found in this clause are all of them descriptive of and are limited to what are described in the clause as the debts and securities due or owing from the debtor. They are not, I think, apt to relieve the debtor of all claims and liabilities which had not crystallized as debts at the date of the deed. Clause 25 again refers to debts and provides for the reconveyance of the trust estate to the debtor when all the debts have been paid.

Having read the deed I confess I am unable to find anything in it which would entitle me to read the words "creditor," "debtors" or "debts" in any wider sense than is ordinarily attributed to those words so as to bring in a person who has a contingent or future claim against the debtor within the scope of this deed. I think it would be improper for me to attempt to construe the deed with reference to the provisions of the Bankruptcy Act with regard to contingent claims merely because it would be hard on the debtor who has denuded himself of all his property to remain liable in respect of any claim against him. Apart from clause 25 of the deed,

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LUXMOORE the word "claim" is not used in the document. The word
J. used throughout is "debts."

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In my judgment, it would be contrary to the true construction of the deed of assignment of October 15, 1936, to hold that Mr. Robinson is a creditor entitled to the benefit of it, or that the debtor's contingent liability to indemnify Mr. Robinson in respect of the property is a debt.

It follows from what I have said that the motion fails and must be dismissed with costs.

Solicitors: *Mawby, Barrie & Letts; Constant & Constant.*

A. R. LL.-T.

In re WATERHOUSE'S POLICY.FARWELL
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[1936. L. 2587.]

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March 1, 2.

Insurance—Policy assigned to Bank by way of mortgage—Assured's loan from Bank in excess of amount for which assignment stamped—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 88, sub-ss. 1, 2; s. 118.

Where a charge to secure a current account without a limit is stamped with a stamp sufficient to cover advances up to a certain sum and the current account subsequently exceeds that sum, the charge is a valid security properly stamped for that sum, but is unenforceable as to the remainder of the loan until properly stamped.

Where an insurance company wrongfully, but acting in good faith, refuses to pay the policy moneys to the assured and his assignee on the date when the policy matures, but subsequently pays the moneys into Court, it is liable to pay interest at 4 per cent. per annum from the date when the policy matured until the date when it paid the moneys into Court.

ADJOURNED SUMMONS.

By a policy dated February 27, 1908, effected by Samuel Herbert Waterhouse on his life with the Law Life Assurance Society and numbered 33516 the sum of 500*l.* was assured to be paid to him or his representatives by the Society with profits on his death or his attaining the age of sixty years. In 1910 the business of the Society, including its liability under the above mentioned policy, was taken over by the Phoenix Assurance Company, Ltd. (hereinafter called “the company”).

On May 19, 1926, S. H. Waterhouse deposited the policy with the Bank of Ireland (hereinafter called “the Bank”) by way of equitable mortgage to secure moneys then due or thereafter to become due by him to the Bank. No memorandum or writing signed by Waterhouse accompanied the deposit, but a record of what occurred signed by two officials of the Bank was kept. By a mortgage, dated February 25, 1928, and made between Waterhouse and the Bank, Waterhouse assigned the policy to the Bank to secure the balance from time to time owing by him to the Bank on current or any other account. Notice of the mortgage was duly given to and

FARWELL acknowledged by the company. On that date the sum owing by Waterhouse to the Bank for principal and interest was 596*l.* 2*s.* 2*d.* and the sum owing by him for principal and interest on March 26, 1928, at the expiry of the thirty days allowed for stamping the mortgage under s. 15, sub-s. 2, of the Stamp Act, 1891, was 623*l.* 12*s.* 11*d.* The mortgage was duly stamped within the thirty days with an Irish Free State stamp for 12*s.* 6*d.*, which was sufficient to cover an advance of 500*l.*, the face value of the policy.

On August 13, 1936, Waterhouse attained the age of sixty years and thereupon the policy, with bonuses amounting to 463*l.*, making a total of 963*l.*, became payable by the company. The sum owing by Waterhouse to the Bank for principal and interest on that date was 619*l.* 12*s.* 6*d.* On July 29, 1936, the company wrote to Waterhouse informing him that the policy would mature for payment on August 13 and asking him to communicate with the Bank so that it might produce the mortgage of February 25, 1928, to the company. On August 4 the Bank sent the company the policy and mortgage deed. On August 5 the company wrote to the Bank stating that, subject to their receiving from the Bank a certificate that the total amount advanced under the deed of February 25, 1928, had not exceeded 500*l.*, they were prepared to pay the Bank the sum falling due on August 13 against a receipt under the seal of the Bank. By a letter dated August 6 the Bank informed the company that it was not in a position to give the company the certificate asked for, but that Waterhouse by a letter enclosed authorized payment being made to the Bank and that if the company was not satisfied with such authorization the Bank would be content for the company to pay them the sum of 500*l.*, the amount which the mortgage was stamped to cover, and that the balance of the sum falling due might be paid to Waterhouse. The company by letter dated August 7 refused to pay 500*l.* to the Bank and the balance to Waterhouse, insisting that the mortgage was insufficiently stamped and must be impressed with an additional stamp. In a letter of August 10 addressed to the company the Bank maintained the

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position that it was entitled to give the company a good receipt for the policy moneys to the extent of the amount covered by the stamp on the deed and that the balance might be paid to Waterhouse. A long correspondence followed between the parties, in the course of which the Bank insisted that in view of the terms of s. 88, sub-s. 2, of the Stamp Act, 1891, the mortgage was duly stamped to the extent of 500*l.* and that they could give a good discharge to the company for that sum without regard to the fact that the advances made by the Bank might at any time have exceeded that sum. As no agreement could be reached between the parties the sum of 963*l.* was paid into Court by the company on November 16, 1936. The Bank then issued this summons asking for an order that the company should lodge in Court a sum equivalent to interest at 4 per cent. per annum, less tax, on the sum of 963*l.* from August 13 down to the date of the order to be made on the summons, after deduction from such interest of any deposit interest earned by such sum since the payment into Court on November 16.

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Harold Murphy K.C. and *Geoffrey Cross* for Bank of Ireland. It is true that under s. 88, sub-ss. 1, 2, of the Stamp Act, 1891, the Bank should have stamped the deed in respect of any moneys advanced in excess of the amount for which it was already stamped. *Morgan v. Pike* (1) is of interest on that point, although it was before the Act. It is also true that under s. 118 the company was bound to see that the assignment was duly stamped. The Bank, however, agreed to accept 500*l.*, the amount for which the assignment was stamped, and that was all the company was concerned with. The Bank could have given a good receipt to the company. On the date when the policy moneys matured the company should have paid over 500*l.* to the Bank and 463*l.* to the assured. It acted wrongfully in withholding the payments.

R. W. Goff for the company. Under s. 88, sub-s. 2, the assignment should be stamped again when the money advanced exceeded the amount covered by the original stamp. Here

(1) (1854) 14 C. B. 473.

FARWELL J. it was never stamped even to cover the amount owing at the date of the assignment. The mortgage was an assignment of the whole of the policy moneys, but the Bank contends that it could give a good receipt if it is paid a part only. The matter was duly considered by the board of the company, and as a result the moneys were paid into Court. The company acted in good faith and ought not to be penalized in any way for so doing.

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Geoffrey Cross for the assured. The company could always have had a good discharge for the 463*l.* from Waterhouse.

Harold Murphy K.C. replied.

FARWELL J. The date of payment into Court was November 16 of last year. That payment into Court was made under the Life Assurance Companies (Payment into Court) Act, 1896, and under Order LIV. (c), which provides for payment in. Under the Act itself the Assurance Company is entitled to pay the money into Court where the board considers that it cannot safely discharge itself of the amount in any other way. This application is in effect an application for payment out to the Bank and the assured of the amount so paid into Court. The Assurance Company has been made a respondent to this summons because the Bank and the assured claim that the Assurance Company should be held liable to pay interest on the amount and the costs of this summons.

The whole controversy in this matter depends upon two sections of the Stamp Act, 1891. Sect. 88, sub-s. 1, provides : " A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited." So far there would not appear to be any difficulty. Where the loan is for a definite fixed sum and security is given for that sum, a stamp duty is to be paid sufficient to cover the total amount which the lender is entitled to recover. It is quite plain that in order to make the security a security for the full amount agreed to

be lent, the security must be stamped on the total of FARWELL that sum. J.

Then sub-s. 2 provides: "Where such total amount is unlimited, the security is to be available for such an amount only as the ad valorem duty impressed thereon extends to cover, but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made."

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Before dealing with that sub-section it is necessary to look at s. 118. Sub-s. 1 provides: "No assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless the assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped." Then sub-s. 2 provides for a penalty if any payment is made in contravention of the section. It follows from that section that in order that the Assurance Company may get a good discharge for the money due it must be satisfied that the assignment is duly stamped, and it runs a risk of a penalty if it pays over the money to an assignee on a security which is not sufficiently stamped. In this case the company contends that the security to the Bank of Ireland is a security stamped for a loan of up to 500*l.* and no more, but that since the Bank permitted the assured to overdraw his account to a sum exceeding 500*l.* the policy automatically became a security for a sum larger than 500*l.* and that it should, therefore, have been stamped with an additional stamp whenever the loan exceeded 500*l.*, or, at any rate, at the date when payment was required by the Bank from the Assurance Company for the amount which was then due and owing on the overdraft.

In my judgment, that is not the true effect of sub-s. 2 of s. 88. The effect of that sub-section is this. Where the total amount is unlimited, as for instance in this case where the Bank permits one of its clients to overdraw his account and there is

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no fixed limit placed upon the amount allowed in overdraft, or where there is a security for a limited sum, and an overdraft is allowed beyond that limited sum, there is no necessity to stamp the security for any amount greater than the amount for which the Bank rely upon it as a security for the loan. By that I mean that if a Bank chooses to take security for an overdraft and stamps that security with a stamp which is only sufficient to cover a limited sum, then, as the result of sub-s. 2, the Bank is precluded from claiming either in a Court of law or elsewhere that the security which it has is a security for any greater sum than that which the stamp on it covers. In this case, supposing there was a claim by the Bank against the assured to recover the amount of the overdraft, the Bank would not be able to claim, as against the insurance money, any greater sum than 500*l.*, that being the amount the stamp duty covers, and for the balance it would be, so far as the insurance policy is concerned, an unsecured creditor. That, in my judgment, is the effect of this sub-section. If a Bank, or any other person, lends money with no limit on the amount to be lent and stamps the security which it takes for a limited sum and subsequently desires that security to be increased so that it will cover a larger sum, then on every occasion when it is desired to increase the security it is necessary to stamp the security with a further duty, and for that purpose the security shall be deemed to be a new and separate instrument on the date on which the advance or loan is made. If that is not done, then the lender is precluded from holding his security, in whatever form it may be, as security for any amount over that which the stamp upon it will cover. Therefore it follows, in my judgment, that the Bank in this case was only entitled to claim against the Assurance Company the sum of 500*l.*, because that alone was the sum covered by the stamp on this security. When once the Assurance Company was satisfied that the Bank held the policy as security and that the security was stamped to cover a loan of 500*l.* it was bound to pay to the Bank the sum of 500*l.*, and, there being no notice of any other incumbrance, the balance to the assured.

The Assurance Company, acting in perfect good faith but

taking a different view of the construction of the Act to that which I have taken, was not prepared to run the risk of paying the money over, and accordingly paid the money into Court and thereby obtained a good discharge for the amount. It follows from what I have said that the Bank is entitled out of the money in Court to receive the sum of 500*l.* and the assured is entitled to receive the balance of that sum, namely, 493*l.*, and any interest that it may have earned in the meantime.

That leaves me to deal with the question whether under the circumstances the Assurance Company is liable to pay any interest on the sum of 963*l.*, and the costs of this summons.

With regard to the question of interest the position seems to me to be this. The Assurance Company has taken up a wrong attitude with regard to this matter. It ought on August 13, 1936, when the money became due, to have paid over 500*l.* to the Bank and the balance to the assured, because before that date, by the letter of August 10, 1936, the Bank had made it quite plain that it would be fully content that the money should be so dealt with. Therefore, in my view, as from that date the Assurance Company was not justified in retaining the money. But when it paid the money into Court, there being a bona fide doubt as to whether it was safe in paying that money over or not, it obtained, in my judgment, a discharge for the amount due. Accordingly, it seems to me that as from August 13, 1936, down to the date of payment into Court the Assurance Company is liable to pay interest on the amount at the rate of 4 per cent. per annum, that is from August 13, 1936, down to the date of payment in, which was in November. Upon that being done it obtained a good discharge, and as from that date cannot be called upon to pay any interest; but in the intermediate period the Assurance Company had in its hands money which belonged either to the Bank or the assured and it was in law wrongfully holding it against those persons, and against those persons it is, in my judgment, to that extent liable to pay interest.

That leaves me to deal with the question of costs. In my judgment the application for payment out could have been made without making the Assurance Company a party. The

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FARWELL Assurance Company had got a discharge, and the plaintiffs
J. were not bound to make it a party to this summons. On the
1937 other hand they were bound to make it a party if they desired
WATER- to claim against the Assurance Company either interest or
HOUSE'S costs. They did so desire in this case, and I cannot say that
POLICY, they were not justified in making the Assurance Company
In re. a party to these proceedings having regard to the fact that I
have held that the Assurance Company is liable to pay interest
for a limited period. On the other hand the claim for interest
by the summons was for a larger sum than that to which I have
found them entitled, namely, a claim for interest from August 13,
1936, down to the date of the order to be made herein, after
deduction from such interest of any deposit interest earned by
such sum since the payment thereof into Court. That they
are not entitled to. They are, in my judgment, entitled to
interest for the period down to November 16 and no more.
They have not therefore wholly succeeded in their claim, and,
in the circumstances, I shall make no order as to costs.

Solicitors : *Freshfields, Leese & Munns ; Walters & Co.*

P. J. B.

In re CRAVEN'S ESTATE.FARWELL
J.LLOYDS BANK *v.* COCKBURN (No. 1).1937
April 23, 27.

[1936. C. 2009.]

Donatio mortis causa—Conflict of laws—British donor—Estate administered in England—Money and securities in bank abroad—Power of attorney with regard to them given to son—Subsequent directions by donor to son to have them transferred to his own name as his property—Instructions sent by him to bank before donor's death.

An English woman domiciled in England, being possessed of certain moneys and securities in a bank in Monaco, gave her son a power of attorney in respect of them. Subsequently, having in mind a pending operation which might prove fatal, she directed him to get this property into his own name because she wished it to be his in the event of her death, and he accordingly gave instructions to this effect to the bank, which complied with them. The testatrix died as a result of the operation, and her estate was administered in England:—

Held, (1.) that the question whether there was a valid *donatio mortis causa* was one arising in the administration of the estate of the deceased and must, therefore, be determined according to English law.

(2.) that the question whether the acts relied on as constituting a parting with the dominion over the property were effective for that purpose must be determined according to the law of Monaco.

(3.) that (both by English law and by the law of Monaco as proved), though the giving of a power of attorney was not by itself such a parting with the donor's dominion over her property as to support a valid *donatio mortis causa*, the subsequent instructions upon which her son acted were sufficient.

ADJOURNED SUMMONS.

The testatrix, Edith Maude Craven, who was a British subject domiciled in England, by her will dated July 6, 1933, gave her residuary estate upon protected trusts as to one moiety each in favour of her sons by her first marriage, Gilbert Eric Cockburn and Guy Leslie Cockburn, with an ultimate trust in favour of the British Legion, Hampstead.

In 1934, being possessed of certain shares and moneys in Lloyds and National Provincial Foreign Bank at Monte Carlo, she desired to put them into a joint account in the joint names of herself and her son, Gilbert Eric Cockburn, but, being advised that under the local law of Monaco this was

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not possible, she executed a power of attorney dated November 15, 1934, a translation of which was as follows: "I, the undersigned, Edith Maude Craven, residing at Nice, Queen's Hotel, Boulevard Victor Hugo, appoint as my attorney Major Gilbert Eric Cockburn, residing in Paris, 29 Rue de Bourgogne, whose signature is at foot, to make any payments to the credit of my account with Lloyds and National Provincial Foreign Bank Ltd., to deposit any sums, stock or shares, to withdraw part or the whole of these sums, as well as any other sums standing to my credit in principal or interest; to give all stock exchange orders, to sign and endorse all cheques, receipts bills and notes, to give discharges, in brief, to use my account and to carry out any banking business with Lloyds and National Provincial Foreign Bank Ltd.; to negotiate any advance in current account as well as I could do it myself; to these purposes give or sign all deeds, bordereaux, discharges and instructions and generally do all that is necessary. The present power of attorney is available until expressly revoked."

On July 15, 1935, having in mind a pending operation which might prove fatal, the testatrix had a conversation with her son, Gilbert Eric Cockburn, telling him to get the shares and the bank balance at Monte Carlo into his own name, as she wanted him to have them in case anything happened to her. Accordingly, on July 18, he posted the bank a letter, dated July 16, in the following terms: "Will you kindly transfer all securities and any cash balance standing in the name of Mrs. E. M. Craven to myself?" On July 20, the bank wrote to Gilbert Eric Cockburn informing him that the amounts of sterling and francs in the account of the testatrix had been credited to him. On July 22, the bank wrote to him as follows: "We beg to inform you that in accordance with your instructions we have placed in safe custody, on your behalf, the securities which we held under the dossier of Mrs. E. M. Craven." The testatrix died on July 20, and her estate was administered in England.

The trustees of her will took out this summons to determine (inter alia) whether she had made an effective donatio mortis

causa of the shares in question or whether they formed part of her estate.

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G. M. Parbury for the plaintiffs.

Fergus Morton K.C. and *C. V. Rawlence* for Gilbert Eric Cockburn. The questions are (1.) whether the law of England or the law of Monaco applies to this matter; (2.) whether according to the law applicable Gilbert Eric Cockburn is entitled to this property. Under the law of Monaco the power of attorney gave him complete control of it and there was, therefore, a sufficient parting with possession to establish a valid *donatio mortis causa*. Moreover, he had at the date of the donor's death reduced it to his own possession by instructing the bank to transfer it to his own name. On the question whether in the circumstances there was a valid *donatio* English law applies, the parties being domiciled in England, the donor having died in England and her estate being administered in England (*Republica de Guatemala v. Nunez* (1); *In re Korvine's Trust. Levashoff v. Block* (2)). To support a *donatio* the delivery of the means of getting at the property is sufficient, and that delivery may be antecedent to the pronouncing of the actual words of gift: *Cain v. Moon*. (3)

Hon. B. Bathurst for Guy Leslie Cockburn did not oppose this contention.

Roxburgh K.C. and *Boraston* for the British Legion. There was no good *donatio mortis causa* according to English law. A *donatio* is an equitable assignment accompanied by an intention to give. The delivery is the paramount feature and the intention to give ancillary. Here there was no sufficient delivery of the property. *Cain v. Moon* (3) did not decide that there could be an antecedent symbolic delivery. Such a delivery in order to be effective must be confined to the subject-matter of the gift. This power of attorney was in the widest possible form, covering all the property which the lady had at the bank at the time, and there was nothing to relate it to any property in particular. Moreover, it did

(1) [1927] 1 K. B. 669.

(3) [1896] 2 Q. B. 283.

(2) [1921] 1 Ch. 343.

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not put it out of her power to deal with the property and therefore, she had never deprived herself of the dominion over it as required to support a good donatio. Further, this case is governed by the law of Monaco which does not recognize a donatio mortis causa. In dealing with such property as this there is a prima facie presumption that the law applicable is that of the country where it is situate. Here there is nothing to rebut that presumption.

Pennycuick for an infant son of Gilbert Eric Cockburn.

Morton K.C. in reply.

FARWELL J. [having stated the facts continued:] The first question which I must consider is: Do those shares and the cash form part of the estate of the testatrix and pass under her will, or are they the property of the defendant Gilbert Eric Cockburn and is he entitled to retain them as the owner thereof?

Generally speaking, it is not permissible by the law of this country for a person to dispose of his or her property after his or her death except by an instrument executed in accordance with the provisions of the Wills Act, 1837. One exception to the general rule is the case of a donatio mortis causa, but in order that it may be valid certain conditions must be exactly complied with; otherwise the attempted donatio is not effected and the property remains part of the property of the testatrix at her death passing under her will. The conditions which are essential to a donatio mortis causa are, firstly, a clear intention to give, but to give only if the donor dies, whereas if the donor does not die then the gift is not to take effect and the donor is to have back the subject-matter of the gift. Secondly, the gift must be made in contemplation of death, by which is meant not the possibility of death at some time or other, but death within the near future, what may be called death for some reason believed to be impending. Thirdly, the donor must part with dominion over the subject-matter of the donatio. If authority for that is wanted it may be found in a decision of Farwell J. (as he then was) in the case of *In re Johnson*. *Sandy v.*

Reilly. (1) In that case the question was whether the handing over of a box and the retention of the key was a sufficient parting with dominion. Farwell J. held it was not. He says in a very short judgment: "This is rather a curious point. The question is whether there was sufficient in the delivery of the box to enable me to hold that the testatrix parted with dominion over it. The argument against this is that she retained the key." Later he says: "Here there was only the retention of the key, and it is said that this fact alone should not prevent me from deciding that here there was a valid *donatio mortis causa*. Having regard to what the lady is reported to have said to her friend in reference to the key, 'If I die, that will be sent to you,' it seems clear that she did not intend to part with her dominion over it. If she had intended to part with her dominion, she would not have said this. It seems clear there was no question here of parting with the dominion, and, consequently, there is here no valid *donatio mortis causa*." As this question of parting with dominion is really the crux of this case, apart from the question of foreign law which I must deal with later—(I am now regarding this from the point of view of English law)—I have considered what was the reason for imposing as a condition of a valid *donatio* that the donor must part with dominion over the subject-matter thereof and the answer seems to me to be that the subject-matter of the *donatio* must be some definite property, and, to ensure that, the donor must put it out of his power between the date of the donation and the date of the death to alter the subject-matter of the gift and substitute other chattels or property for it. Otherwise, so long as the subject-matter of the gift remained in the dominion of the donor, the donor might at any time between the *donatio* and the gift deal with it as he or she pleased. Take for instance the case of a box. The donor says to the donee: "This box contains certain valuables which are to be yours in the event of my death from the operation which I am going to undergo in a few days, but I propose to retain the box and the key of the box." If that was the

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position it would be open to the donor at any time to take out of the box whatever was in it replacing it with other valuables, and in my view it is in order that that should not be possible that one of the requirements of a good donatio is that the donor should have parted with dominion so that whatever the original subject-matter of the donatio was it should remain the subject-matter in the event of the death of the donor. In the case of the box it is not necessary to hand over the box if the key is handed over because it is assumed that the key which unlocks the box being in the possession of the donee the donor cannot have access to the contents so as to deal with them in any way. I know of no decided case in which the question has arisen whether the handing over of a box and one key, it being proved that there was another key retained by the donor, would be sufficient, but in the absence of authority, in my judgment, it would probably be held not to be sufficient parting with dominion because the donor would have retained dominion over the box and the contents of the box by retaining the power to open it although it might be in the possession of the donee. However that may be, it seems to me that there must be such a parting with the dominion over the chattels or the property as to prevent the subject-matter of the donatio being dealt with by the donor in the interval between the donatio and either the death or the return of the articles by the donee to the donor.

Having regard to those principles I must consider what is the effect of the giving of the power of attorney in this case. The position of the donee of a power of attorney is merely to act as agent for the principal and there is nothing to prevent the principal dealing with the property notwithstanding it, and in my judgment the mere giving of a power of attorney to the donee is not such a parting with dominion as is required to constitute a valid donatio mortis causa. If, therefore, the validity of this donatio rested solely on the power of attorney I should come to the conclusion that it was not valid. But the matter does not rest there, because there is the clear evidence that during the

Channel crossing on the English steamer the lady instructed her agent, her son, to get the particular shares and money transferred into his own name in the bank abroad and that he acted on these instructions, and in my judgment by procuring the transfer of the property into her son's name the testatrix did what was necessary in order to part with dominion. Accordingly in my judgment, if this question is a question which has to be decided according to English law, the necessary conditions for a valid donatio mortis causa have been fulfilled and the defendant is now entitled beneficially to this property and it did not form part of the estate of the testatrix at her death.

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But there is a further question which I must consider, because it has been argued on behalf of the defendant that this is not a case which falls to be decided in accordance with English law. It is said and said truly that the subject-matter of this donatio consists of moveables situate at all material time in Monaco, that is to say, in a foreign country, and that the question of the ownership of those moveables must be determined in accordance with the law of the place in which those moveables were.

In my judgment this is a question which arises in the administration of the estate of the testatrix. She was an English woman domiciled in England and she died in England. Her estate is being administered in England according to English law. No doubt the question whether this property belonged to the lady or to her son is a question which might have to be decided in proceedings taken by the son against the executors or by the executors against the son and in that sense it is not perhaps quite strictly correct to say that it is purely a question of administration, but, in my judgment, it is a question of administration in the sense that the executors are bound to get in the whole of the estate of their testatrix and as soon as they found that apparently part of her estate consisted of these shares and this money they were bound to endeavour to get it in and the question whether or not they can rightly claim it from the person who was in possession at the death is one to some extent, at

FARWELL any rate, of administration and, in my judgment must
J. be decided by English law, subject only to this; it being
1937 necessary according to English law that there should
CRAVEN'S be an effective parting with dominion over the property,
ESTATE, that which is said to constitute the parting with
In re. dominion must be an act which would be effective in the
LLOYDS place where the property is situate according to the law of
BANK that place. As I understand the evidence as to the law of
v. Monaco there is nothing whatever which prevents what was
COCKBURN done being a sufficient parting with dominion.
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So far as the power of attorney alone is concerned I think that there is no real difference between the law of Monaco and the law of this country. In both cases the donee of the power is a mere agent and there is no question of the donor of the power parting with dominion to the agent at all although the agent is clothed with authority to deal with the property so far as the power permits, in the same way as the principal could have dealt with it. But since, in my judgment, the mere giving of the power of attorney would be insufficient in English law, it is immaterial to consider what the foreign law might be with regard to that. I can find nothing whatever in the evidence as to the foreign law, to suggest, nor can I believe, that it would be right to say that once the property, shares and money had been transferred into the sole name of the donee, the donor or any one else could object to the donee dealing with that property as he pleased without reference to the donor, and if that be so, since the other conditions have already been fulfilled, it follows that in my judgment these shares and money were the subject-matter of a valid *donatio mortis causa*, that the son is entitled to them and that they do not form part of the testatrix's estate.

Solicitors: *Morris, Ward-Jones, Kennett & Co.; Gordon, Dadds & Co.; Vizard, Oldham, Crowder & Cash.*

F. H. C.

In re CRAVEN'S ESTATE.FARWELL
J.LLOYDS BANK LIMITED *v.* COCKBURN (No. 2).1937
April 27.

[1936. C. 2009.]

Will—Construction—Power of advancement to purchase business or part of a business—Application of trust funds to enable one of the beneficiaries to become a member of Lloyd's not within the power—Not expedient for the trust as a whole—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 57, sub-s. 1.

A testatrix bequeathed her residuary estate to her trustees upon trust as to one equal moiety to apply the income upon protective trusts in favour of her son, G. E. G. C., during his life, with remainders over. By a codicil the testatrix empowered the trustees to apply the whole or a part of the share of G. E. G. C. by way of advancement for the purpose (inter alia) of purchasing a business or part of a business. He was desirous of establishing himself as an underwriting member of Lloyd's, and the summons asked whether the trustees could apply the whole or part of his share for that purpose:—

Held, that such a transaction could not be said to be the purchase of a business or part of a business, and that, therefore, it did not come within the power of advancement given to the trustees by the codicil.

Sect. 57, sub-s. 1, of the Trustee Act, 1925, provided: "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit. . . ."

Held, that for the Court to exercise its powers under the sub-section, the proposed transaction must be, in the opinion of the Court, expedient, not for the benefit of one beneficiary only, but for the benefit of the whole trust.

ADJOURNED SUMMONS.

By her will, dated July 6, 1933, the testatrix, after appointing R. M. Everett and G. L. Smallwood to be her executors and trustees and making the usual dispositions as to the payment of her testamentary and funeral expenses, debts and legacies, bequeathed her residuary estate to her

FARWELL trustees to stand possessed of the residuary trust fund upon
 J. trust as to one equal moiety thereof to apply the income
 1937 thereof upon protective trusts in favour of her son, the
 CRAVEN'S ESTATE, defendant Gilbert Eric Graham Cockburn (hereinafter called
In re. Eric Cockburn), during his life and after his death in trust
 LLOYDS BANK LD. for all his children (other than his son Alistair Cockburn)
v. who being sons should attain the age of twenty-one years
 COCKBURN (No. 2). or being daughters should attain that age or marry in
 equal shares and if there should be no such child of the
 defendant Eric Cockburn then upon the trusts therein-
 after declared of and concerning the other equal moiety of
 the residuary trust fund, subject to any exercise of the power
 thereby conferred of appointing a life or less interest in favour
 of a surviving wife of Eric Cockburn. And she gave the other
 moiety of the residuary trust fund upon similar trusts in
 favour of her son, the defendant Guy Leslie Cockburn, with an
 ultimate trust, in the event of none of her grandchildren
 attaining a vested interest in the residuary trust fund, in
 favour of the British Legion absolutely. By the first codicil
 to her will, dated July 24, 1934, the testatrix revoked the
 appointment of R. M. Everett and G. L. Smallwood as
 executors and trustees of her will and appointed the plaintiffs
 (therein called "the Bank") to be trustees and executors in
 their place.

Clause 6 of the codicil provided: "I declare that notwithstanding the trusts declared in my said will of and concerning the residuary trust fund the Bank may in its uncontrolled discretion at any time and from time to time at the request in writing of my son Gilbert Eric Graham Cockburn but subject nevertheless as hereinafter provided raise the whole or such part or parts as the Bank shall think fit of Eric's share (defined in my said will) and pay or apply the same for the advancement or benefit of my said son Gilbert Eric Graham Cockburn." Then there followed a like provision as to the share of her son, G. L. Cockburn, and the clause continued: "Provided nevertheless that no moneys shall be raised by the Bank and paid or applied as aforesaid for the advancement or benefit of either of my said sons,

except for one or more of the following purposes, namely : FARWELL
 (a) The purchase of a dwelling-house. (b) The purchase of a J.
 business or a share in a business. (c) The purchase of an 1937
 annuity. (d) The payment of the expenses of an illness or CRAVEN'S
 serious operation." By a second codicil to her will, dated ESTATE,
 May 12, 1935, the testatrix appointed Eric Cockburn to be *In re.*
 an additional executor and trustee of her will. LLOYDS
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The testatrix died on July 20, 1935. The defendant Eric Cockburn was desirous of establishing himself as an underwriting member of Lloyd's, and for that purpose he requested the Bank to concur with him in exercising in his favour the power of advancement conferred by clause 6 of the first codicil, and question 2 of the summons raised the question whether the power of advancement contained in clause 6 of the first codicil authorized the application of the whole or part of the settled share of Eric Cockburn in providing the funds necessary to enable him to become an underwriting member of Lloyd's. Question 3 asked that if and so far as might be necessary the trustees of the will and codicils of the testatrix might be empowered under s. 57 of the Trustee Act, 1925, to apply the whole or a sufficient part of such settled share in like manner.

G. M. Parbury for plaintiffs.

Fergus Morton K.C. and *C. V. Rawlence* for the defendant, Eric Cockburn. What is proposed here comes within the power of advancement given to the trustees in clause 6 of the first codicil. If they have power to apply the whole or part of Eric's moiety in purchasing a business for him, they must have power to apply the money in establishing him as an underwriter at Lloyd's. It is, in effect, a business. If the proposed transaction does not come within the power of advancement, then it comes within s. 57, sub-s. 1, of the Trustee Act, 1925. It is for the benefit of Eric Cockburn and his children, and the Court will therefore consider it expedient to grant the application. If the application is not granted the money will probably be taken out of the fund to purchase a business and may all be lost.

FARWELL J. *Roxburgh K.C. and Boraston* for the British Legion. It cannot be said that the proposed transaction is within the power of advancement given by clause 6. The money would not be applied for the purpose of purchasing a business or part of a business, and it is outside the jurisdiction of the Court to make an order under s. 57, sub-s. 1, of the Trustee Act, 1925. The proposed transaction is not a transaction in the management or administration of the property, as in *In re Beale's Settlement Trusts*. (1) Nor could it be said to be expedient for the trust as a whole. It would be for the benefit of one beneficiary only. Under those circumstances the Court will not make an order under the sub-section.

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FARWELL J. The question I now have to determine is whether the trustees can, under a power of advancement in the will of the testatrix, make an advance for the benefit of her son, Major Eric Cockburn, to enable him to become a member of Lloyd's or, if they have no power to do that, whether under s. 57 of the Trustee Act, 1925, the Court will permit that to be done?

There is no doubt that the testatrix in her lifetime realized that her son was anxious to become a member of Lloyd's and she offered to find the necessary fund, which amounts to about 11,000*l.*, to enable him to do so; but the son, realizing it would mean a sacrifice of income to his mother, would not agree to that, and she thereupon told him she would provide for him in her will. She made a codicil to her will after that conversation, but in construing the will and codicil I cannot take into consideration evidence of the son of what the intention of the lady was. I must construe the codicil having regard to the terms which the testatrix has used and see whether what is desired to be done comes within the language which has been used. The power to advance in the case of the shares given to the two brothers is to be found in clause 6 of the first codicil. [His Lordship read clause 6, and continued:] Apart from the express limitation at the end of this clause the power would be a wide one, since it would

(1) [1932] 2 Ch. 15.

be an unqualified power to apply the share "for the advancement or benefit of my son Gilbert Eric Graham Cockburn," and it would, I think, entitle the trustees to do that which they desire to do. Unfortunately, from the point of view of the son, the lady did not leave the power of advancement in that form; but she added the proviso, and that is in a form which plainly prohibits the exercise of what would otherwise be an extremely wide power of advancement, except in certain particular directions. The only one that is relevant to the question which I have to consider is the purchase of a business or a share in a business. What the trustees are desired to do, if they have power, is to hand over almost the whole of Eric's share in the estate to the trustees of Lloyd's as a fund which would be available to meet his liabilities. If that were done and if no calls were made on the fund and no liabilities had to be paid out of it the fund would ultimately come back again into the trust. In substance it comes to this, that what the trustees are being asked to do is to invest almost the whole of the share of the son Eric under this lady's will in an investment which is not authorized by law and which might result in the loss of the whole or a substantial part of the fund, if it ever became necessary to discharge out of it the liabilities of the son in connection with his business as an underwriter at Lloyd's. I cannot think that a transaction such as that can be said to be the purchase of a business or a share in a business. If a person desires to become an underwriter at Lloyd's he must provide and deposit with the trustees of Lloyd's certain funds; but to say that that is the purchase of a business seems to me to be a misuse of language. It may be most desirable for the son Eric to become an underwriter at Lloyd's; but I cannot, as a matter of construction, say that to place in the hands of the trustees at Lloyd's the necessary fund to enable him to carry on business as an underwriter at Lloyd's is the purchase of a business or a share in a business within the words of the will.

Then it is said that if it does not come within the power of advancement, the Court ought to sanction such payment

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FARWELL J. under s. 57 of the Trustee Act. Sect. 57 is undoubtedly framed in very wide terms. It is intended to apply to cases where the powers expressly given by the instrument creating the trust are insufficient to enable that to be done which it is expedient to do in the interests of the beneficiaries under the trust which the trustees have to administer, but which without this power could not be done at all. The language, as I have said, is very wide. It is: "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction." Pausing there for a moment, to come within the section the matter must be one which arises in the management or administration of property vested in trustees; but so long as the matter does so arise, there is nothing in those words which limits the power of the Court under the section. Then the section goes on: "is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose," etc., the Court may authorize it to be done. The word "expedient" there quite clearly must mean expedient for the trust as a whole. It cannot mean that however expedient it may be for one beneficiary if it is inexpedient from the point of view of the other beneficiaries concerned the Court ought to sanction the transaction. In order that the matter may be one which is in the opinion of the Court expedient, it must be expedient for the trust as a whole. Applying that to the present case, this is in substance an application to enable the trustees to invest the share of one of the sons in a form of investment not authorized by law or by the will. It is an investment, to some extent, of a risky nature, and it cannot be said to be expedient for the trust as a whole that such an application should be acceded to. It may be for the benefit of the son himself that he should become a member of Lloyd's. It may be desirable from the point of view of his child or children, but how it can be said to be expedient from the point of view of his brother, Guy, or any children he may have or for the other beneficiary, the charity, I wholly fail to see.

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It cannot be expedient for Guy and his children or the charity that a substantial part of the trust funds to which they may ultimately become entitled should be put in possible jeopardy. FARWELL J.

For these reasons I have come to the conclusion, with some little regret, that I cannot sanction what is sought to be done in this case. I am satisfied it does not come within the express power of advancement given by the will and codicil, and, in my judgment, it is not a case in which the Court ought to exercise the wide power given by s. 57, and I must accordingly decide that this is a transaction which cannot be effected at all either under s. 57 or the power of advancement.

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Solicitors : *Morris, Ward-Jones, Kennett & Co. ; Gordon, Dadds & Co. ; Vizard, Oldham, Crowder & Cash.*

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April 13, 14.

NOEL v. TRUST AND AGENCY COMPANY
OF AUSTRALASIA, LIMITED.

[1937. N. 413.]

Company—Uncalled capital—Money paid in advance of calls—Payment of interest without deduction of income tax—Injunction—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), All Schedules Rules, r. 23, sub-r. 2.

A company, incorporated in 1860, under a power contained in its articles, in 1865 and subsequently accepted from its ordinary shareholders money paid up in advance of calls to bear interest at 6 per cent. At a later date further sums were paid up in advance of calls in pursuance of an offer by the company to pay interest at the rate of 4 per cent. per annum free of income tax. The company regularly paid the interest on these advances, without deducting income tax :—

Held, (1.) that as regards the payments at the rate of 6 per cent. the Court could not presume that the company had entered into a new contract with shareholders making such advances to pay those shareholders interest at such a rate as after deduction of tax thereon would yield a clear 6 per cent.

(2.) that as regards the payments made at the rate of 4 per cent. the contract could not be construed as a contract to pay interest at such a rate as after deducting income tax would leave a clear 4 per cent., and that the agreement to pay interest free of income tax was void under r. 23, sub-r. 2, of the All Schedules Rules; Income Tax Act, 1918.

MOTION.

The action was brought by the plaintiff Emil Valentin Noel on behalf of himself and all other ordinary shareholders in the Trust and Agency Company of Australasia, Ltd. (hereinafter called "the company"), who had not paid up any moneys on their shares in advance of calls, against the company and the Foreign and Colonial Investment Trust Company, Ltd., being a shareholder in the company which had paid money in advance of calls, claiming a declaration that the company was bound to deduct income tax from interest payable by the company on sums received by it in advance of calls on the ordinary shares of the company and that any agreements to the contrary between the company and the holders of such shares were void and illegal. The plaintiff also claimed an injunction to restrain the company from paying any such interest free of

tax in future. By agreement the hearing of the motion was treated as the trial of the action.

The company was incorporated in 1860, and by article 6 of the original articles of association it was provided that the directors might, if they thought fit, receive from any of the shareholders willing to advance the same the remainder of the capital subscribed for by them and not actually called up, such advances to be entitled to receive interest thereon at the rate of 6 per cent. per annum. The original capital was 500,000*l.* in 50,000 ordinary shares of 10*l.* each, and was increased from time to time to 2,000,000*l.*, of which 1,000,000*l.* consisted of Cumulative Preference Stock, and the balance of 100,000 ordinary shares of 10*l.* each, upon all of which only 1*l.* per share had been called up. On 45,021 of these ordinary shares, the remaining 9*l.* had been paid up by the holders in advance of calls, under options granted by the company in 1863, 1885 and 1898; but nothing had been so paid up on the remainder. In 1863 the company issued a circular to its ordinary shareholders inviting them under the provisions of article 6 to make payments in advance of calls on their shares to bear interest at 6 per cent. per annum. Similar offers were made to and accepted by ordinary shareholders at later dates. From the year 1865 interest was paid by the company on the moneys so paid in advance of calls without any deduction for income tax.

In 1885 article 6 was altered by adding the words "or at such lower rate as they and the directors may agree upon"; but the rights of such shareholders as were entitled to receive 6 per cent. interest on their advances were preserved.

In May, 1885, the directors issued a circular offering to pay interest on sums paid in advance of calls, such payments to bear interest at the rate of 4 per cent. per annum to be paid free of income tax. The company continued to pay all the interest both at the rate of 6 per cent. and at the rate of 4 per cent. free of tax.

As regards the payments at the rate of 6 per cent., the defendants contended that a bargain must be presumed to have been made between the company and its shareholders advancing

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uncalled capital to pay interest at such a rate as after deduction of income tax at the current rate would amount to 6 per cent. As regards the payments at the rate of 4 per cent. the defendants contended that the company must be presumed to have intended to offer to pay interest at such a rate as after deduction of income tax would leave a clear sum of 4 per cent., and that the contract must be so construed.

W. P. Spens K.C. and *D. Ll. Jenkins* for the plaintiff. The company down to about 1864 paid the interest on these moneys paid up in advance of calls under deduction of income tax. Since 1865 no income tax has ever been deducted from these interest payments. The practice of the company has been contrary to the law, which is now contained in rr. 19, 21 and 23 of the All Schedule Rules under the Income Tax Act, 1918. Rule 23 was formerly s. 103 of the Income Tax Act, 1842. The history of this section is discussed by Lord Macnaghten in *London County Council v. Attorney-General*. (1) The rule is the same whether the interest is payable out of profits brought into charge or not.

Vaisey K.C. and *Gordon Brown* for the first defendants, the Trust and Agency Company. This practice of paying interest without deduction of tax therefrom has continued for seventy-two years, and it can only be accounted for by presuming that there must have been a contract, now lost, varying the articles to the extent of paying 6 per cent. free of tax. The company must be presumed to have offered the shareholder a clear net rate of 6, or in a later offer 4 per cent. interest, i.e. such a rate as after deduction of income tax thereon at the current rate, left 6 or 4 per cent. interest clear. This would be a perfectly valid contract, and it is the contract the directors intended to make. These are informal documents, but that was the intention. The Court will presume that the parties intended to enter into a valid, not a void contract. See *Burroughes v. Abbott* (2); *Jervis v. Howle and Talke Colliery Co., Ltd.* (3); *Brooke v. Price*. (4)

(1) [1901] A. C. 26, 38.

(2) [1922] 1 Ch. 86, 95.

(3) Ante, p. 67.

(4) [1917] A. C. 115.

Wynn Parry K.C. and *F. H. Talbot* for the second defendants, Foreign and Colonial Investment Trust Company, Ltd., shareholders in the first defendant company, which had paid up money in advance of calls, put forward similar arguments.

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SIMONDS J. This is a case which comes before me on a motion, but the parties have agreed that the hearing of the motion should be treated as the trial of the action. It has, therefore, been incumbent on me to go rather more fully into the matter than perhaps I should have done if it were merely a motion.

The action is brought by Mr. Noel, who sues on behalf of himself and all other members of a company called Trust and Agency Company of Australasia, Ltd., except such members as are defendants or are holders of shares of the company in respect of which sums have been paid in advance of calls. The defendants are the company which I have named and the Foreign and Colonial Investment Trust Company, Ltd., who are sued on behalf of themselves and other holders of shares of the company in respect of which sums have been paid in advance of calls, and certain other defendants who are directors of the company.

The claim in the writ, in respect of which relief also is sought by the motion, is for a declaration that the company is bound to deduct income tax from the interest payable by the company on the sums received by it in advance of calls on ordinary shares of the company and that any agreements to the contrary between the company and the holders of such shares, or any of them, are illegal and void.

The reference to the illegality and avoidance is, of course, a reference to the provisions of the Income Tax Acts, now found in r. 23, sub-r. 2, of the All Schedule Rules of the Income Tax Act, 1918, which superseded s. 103 of the Income Tax Act, 1842.

The circumstances in which the relief is sought are these. The company was incorporated as long ago as November, 1860. Its capital was originally 500,000*l.*, divided into 50,000 shares of 10*l.* each. They were the only shares, and

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I will call them ordinary shares. That capital was from time to time increased. It was first increased in February, 1883, to 1,000,000*l.*, by the creation of 50,000 5 per cent. Cumulative Preference shares of 10*l.* each. It was again increased in December, 1884, to 1,250,000*l.*, by the creation of 25,000 new ordinary shares of 10*l.* each. It was further increased in December, 1886, to 1,500,000*l.*, by the creation of 25,000 further similar preference shares. Finally, in February, 1893, it was increased to its present amount of 2,000,000*l.* by the creation of 25,000 further preference shares of 10*l.* each and 25,000 further ordinary shares of 10*l.* each.

The only article in the original articles of association to which I need refer is No. 6, which has given rise to the question before the Court: "The directors may, if they think fit, receive from any of the shareholders willing to advance the same the remainder of the capital subscribed for by them beyond the sums actually called up on their respective shares, and upon so much of the moneys so paid, as from time to time shall exceed the amount of the calls then made upon the shares in respect of which such advance has been made, such shareholders shall be entitled to interest at the rate of six pounds per cent. per annum." That article stood until the year 1885, when it was altered by a special resolution of the company, which provided as follows: "That the following words be added to article 6 in the articles of association, that is to say, following upon the words 'at the rate of 6 per cent. per annum,' 'or at such lower rate as they and the directors may agree upon, but nothing herein contained shall alter or affect the rights and position of any persons who hold or shall hold shares as to which interest is now payable at the rate of 6 per cent. per annum upon capital paid beyond the sums actually called up on such shares.'"

That article remained until the year 1908, when new articles, in the modern form, were as a whole substituted for the old articles. Article 5 provided, in relation to the capital of the company, as follows. It first stated what the existing capital of the company was, as I have already given it, and then set out the position with regard to the preference shares. It

continued: "At the date of the adoption of these articles 87,500 of the preference shares are issued, and are fully paid, and 87,500 of the ordinary shares have been issued, and the sum of 1*l.* a share has been paid up thereon, but on 45,021 of such ordinary shares 9*l.* a share or 405,189*l.* in the aggregate has been paid up in advance of calls and carries interest at various rates not exceeding 6 per cent. per annum." By article 22: "The directors may if they think fit receive from any member willing to advance the same all or any part of the money due upon the shares held by him beyond the sums actually called up thereon, either as a loan repayable or as a payment in advance of calls, but such advance, whether repayable or not, shali, until actually repaid, extinguish, so far as the same shall extend, the liability upon the shares in respect of which it is advanced, and upon the money so received, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which it has been received, the company may pay interest at such rate as the member paying such sum and the directors have agreed upon or may hereafter agree upon."

It is clear from the statement in article 5 of the modern articles that the power contained in the original article 6, and that article as altered, had been very largely exercised, so that a sum amounting in the aggregate to 405,189*l.* had been paid by members in advance of calls.

Except for a year, or half a year—I am not sure which—at the very beginning of the company's existence, the company has consistently paid the whole of the interest due in respect of those calls without deduction of tax, and the question for the Court is whether it has rightly so done; and, further, whether it is bound to go on paying interest without deduction of tax in future. No question here arises as between the company or any shareholders and the directors with regard to any past payments, and nothing that I am going to say in this case must be regarded as in any way fixing any liability on the directors in respect of such past payments. That is a matter which is not now under review. But I must, for the purpose of determining this case, consider what are, and

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SIMONDS J. have at all times been, the rights of the parties under the documents as they are brought before me.

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The question really falls into two parts. First of all I have to consider what are the rights of the parties with regard to payments made by the company in respect of which, so far as the documents go, the bargain was to pay 6 per cent. interest. I shall then have to consider what are the rights of the parties in respect of those payments where 4 per cent., free from income tax, or 3 per cent., free from income tax, was expressed to be the interest payable.

The position, as stated in evidence, is this. It appears that for a short time—and I am not concerned with this—interest at the rate of 5 per cent. was paid in respect of certain advances. In para. 17 of the affidavit of Mr. Noel, filed in support of the motion, it is stated that “The interest at the rate of 5 per cent. and subsequently at the rate of 6 per cent. per annum paid down to December 31, 1864, on the sums paid in advance of calls on the shares in the original capital of the company for the time being issued was paid subject to deduction of income tax but the interest at the rate of 6 per cent. per annum on the said sums for the six months ending on June 30, 1865, was paid free of tax.” He says: “There is nothing in the records of the company to indicate why the said interest for the six months to June 30, 1865, was paid free of tax and not subject to deduction of tax, but the company has ever since that period continued to pay interest on all sums received in advance of calls prior to the year 1884 at the rate of 6 per cent. per annum without deduction of income tax.”

The bargain between the parties, so far as it is to be found in any document, is to be found in a circular dated June 6, 1864. It contains this statement: “I am to remind you that the sum of ” so and so “stands at your credit in the books of the company, as money paid in advance of calls. On this amount interest to 30th instant will accrue . . . the rate will be increased to 6 per cent. per annum, to be paid in priority of dividends.” That was in accordance with the articles, for the articles authorized nothing more than the

payment of 6 per cent. interest, and it is quite clear that an authority to pay 6 per cent. interest is an authority to pay 6 per cent. and no more. And if the obligation imposed on the company is to pay 6 per cent., it discharges that obligation by paying 6 per cent., less income tax, for it is the law which imposes on the payer of interest the right or the duty to deduct income tax at the current rate and to account for it, if he has to account for it, to the authorities. The company is not entitled to pay a larger sum than 6 per cent. interest—namely, such a sum as after deduction of tax will leave a clear rate of 6 per cent. Accordingly, unless some new bargain was made, superseding the authority of the articles, and substituting for the maximum rate of 6 per cent. some higher rate, the payment of that higher rate cannot be justified.

Of such a bargain there is no shred of evidence whatsoever. But I am asked to presume, and it is said that I must presume, that such a bargain was made, for otherwise I am compelled to adopt the alternative view, which is said to be a fantastic view, that throughout all this time a mistake has been made. If I have to adopt one or other of those alternatives, I have no hesitation in adopting the latter one and in saying that this payment of a higher rate of interest than was justified by the articles, or than appears to be justified by any document which is before me, was due to a mistake made first in the year 1865, repeated in following years and so perpetuated. I see nothing improbable, much less anything fantastic, in such a thing being done; but I do see grave improbability, indeed I see something fantastic, in the suggestion that in the year 1865, or thereabouts, some bargain was made binding on the corporators and binding on the company by which there was substituted for the article rate of 6 per cent. some other higher rate. Of that, as I say, there is no shred of evidence. On the contrary, although it is not conclusive, I think it is of the utmost importance in considering it that when, in 1885, the article was altered to provide for a lower rate, but nevertheless preserving the rights of those with whom a bargain had been made to pay a higher rate, to which reference is made, the resolution was as

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follows : " Nothing herein contained shall alter or affect the rights and position of any persons who hold or shall hold shares as to which interest is now payable at the rate of 6 per cent." On the facts before me I find it impossible to make any presumption of such a bargain as would justify payment at a higher rate than 6 per cent.

I shall, I hope, when it is necessary, give due weight to the maxim "*omnia praesumuntur rite esse acta*," which was pressed on me ; but I say that on the facts of this case I find no obligation to apply such a maxim, finding sufficient explanation of what was done in an error easily made and easily perpetuated. Accordingly, so far as the 6 per cent. payments are concerned, I hold that the payment of 6 per cent., free of tax, was not justified in the past and cannot be made in the future.

I now come to the other part of the case—namely, those payments in respect of which interest at 4 per cent., free of tax, was made. The position with regard to those payments is this. I think it is common ground between the parties that unless I can find, on the true construction of the document on which the bargain was founded, that that bargain is not truly an agreement to pay 4 per cent., free of tax, but an agreement to pay such a sum as after deduction of tax will amount to 4 per cent., the payment which has been made is equally unjustifiable. For that purpose I must look at certain of the documents.

In May, 1885, the company made its offer to pay interest on the sums paid by shareholders in advance of calls. The terms of the offer are contained in a circular addressed to the shareholders : " In view of the unanimous resolve of the shareholders in special general meeting to alter article No. 6, so as to enable the directors to accede to the continuous applications of shareholders to pay up capital beyond the amount actually called up on their shares, the directors desire to state that, upon confirmation of the resolution passed on the 14th instant, they will be prepared to accept payment of shares in full, such payments to bear interest at the rate of 4 per cent. per annum, to be paid free of income tax and in priority of dividend. In order, as explained at the meeting,

that payment of the 4 per cent. interest may be made simultaneously with the dividend a deduction of 1*l.* 10*s.* per cent. will be allowed on the amount of every payment of shares in full." That is the offer, which is followed by an explanatory statement, which I will read because it was so much relied on by the defendants in this case. "For twenty-one years past the dividend on the capital called up (1*l.* per share) has been at the rate of 20 per cent. If to such dividend the interest at 4 per cent. on the capital uncalled (9*l.* per share) be added, both paid free of income tax, it will be found that the dividend and interest payable upon each fully paid share of 10*l.* will together amount to 5*l.* 12*s.* per cent. ; if freedom from income tax be taken into account to nearly 5*l.* 15*s.* per cent."

Those were the terms of the offer, and annexed to the circular there is a form of application which, I assume, was the form used by the shareholders. It is in these terms : "Gentlemen, Referring to your circular letter of May 21, 1885, I desire to pay up the remainder of the capital uncalled upon . . . shares of the company standing in my name, and request that you will send me the necessary pay-note to accompany the remittance to the company's bankers. It will be convenient to me to make the payment on or about the . . . next." That was the offer and that was the acceptance. It appears to me quite clear that it was an offer and an acceptance to make payments in advance on the terms that interest would be payable on the advance so made at the rate of 4 per cent. per annum free of tax. That is the contract : there is no informality about it at all. I am wholly unable to find in the explanatory statement anything which would justify me in saying that on the true construction of this document it is not an agreement to pay interest at the rate of 4 per cent. per annum, free of tax, but is an agreement to pay interest at such a rate as after deduction of income tax will leave a clear sum or rate of 4 per cent.

Much, in argument, was founded on the so-called informality of this document. I find nothing informal about it. It is a formal document containing a letter of offer and a letter of acceptance. The argument on informality was, I think,

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directed to certain cases: *Burroughes v. Abbott* (1) and *Jervis v. Howle and Talke Colliery Co., Ltd.* (2) In both of those cases the question on which the decision turned was whether there could be rectification of a formal deed, which had been executed, in the one case, to carry out an order of the Divorce Court, and in the other to give effect to an undoubtedly informal memorandum which the parties had themselves prepared. In both of those cases the learned judges came to the conclusion that they would be justified, as a matter of rectification of the document, to alter the document so as to give effect to what they found was the intention of the parties. Nothing that I say now is in conflict with those decisions, nor is it necessary for me to distinguish them. I am in no way concerned here with a case of rectification but only with the question of what was the meaning of the document which I have before me. It appears to me to be quite plain that the meaning of that document is that which appears on its face—namely, an agreement to pay interest at a certain rate free of tax. If it is such an agreement, then, so far as it provides for payment free of tax, it is avoided by the provisions of the Income Tax Act, 1918.

Hence it follows that, with regard also to the payments made at the rate of 4 per cent. or 3 per cent., free of tax, those payments were and are unjustifiable and that the company can no longer make such payments without deduction of tax. The final payments which were made were made not on the faith of any circular containing such an explanatory statement as that which I have read, but simpliciter on an agreement for payment of interest free of tax. With regard to those the argument put forward was this, that the company had adopted a practice then so well known and well established that it must be presumed that with regard to such payments also the bargain between the parties was that it should be the payment of such a sum as after deduction of tax should leave a clear sum of so much. There is not a shred of evidence which would justify me in coming to such a conclusion and I cannot give effect to such an argument.

(1) [1922] 1 Ch. 86.

(2) Ante, p. 67.

Accordingly, I propose, as this matter is treated as the trial of the action, to make a declaration in accordance with the writ. There will be an injunction restraining the company from paying any such interest without deducting income tax.

Solicitors : *Pritchard, Englefield & Co. ; Slaughter & May ; Norton, Rose, Greenwell & Co.*

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Electricity—Railway electrification—Right of authorized undertaker to supply current—Original railway undertaking outside proposed area of supply—Amalgamation—Undertaking absorbed by amalgamated company—Railway partly within and partly without area of supply—“ May supply and are supplying within their . . . area of supply electricity for haulage or traction ”—Consent of Minister of Transport—Supply for general purposes, partly used for haulage—Railways Act, 1921 (11 & 12 Geo. 5, c. 55)—Electricity (Supply) Act, 1926 (16 & 17 Geo. 5, c. 51), s. 47.

The Corporations of Birkenhead and Liverpool were each authorized undertakers for the supply of electricity within their respective areas of supply. The L. M. & S. Railway, an amalgamated railway within the Railways Act, 1921, desired to obtain a supply of electricity for working the Wirral Railway, a detached portion of their system lying partly within the Birkenhead, but wholly without the Liverpool area, and obtained tenders from Liverpool and Birkenhead. The Liverpool tender being materially lower, the railway company accepted this subject to the consent of the Minister of Transport, which was given after the holding of a local inquiry. It was proposed to give the supply at a point in Liverpool belonging to the railway company and to convey it to the Wirral Railway through the Mersey Railway tunnel under a wayleave agreement.

The plaintiff brought this action at the relation of the Birkenhead Corporation against the Liverpool Corporation and the L. M. & S. Railway, claiming that the defendant Corporation had no power to give or the railway company to contract to take such a supply under the Electricity (Supply) Act, 1926, and that the Minister of Transport had no jurisdiction to give his consent thereto :—

Held, (1.) that the Wirral Railway was not a separate undertaking, limited, in respect of powers of electrification, by its own private Acts, but part of the L. M. & S. Railway, an undertaking partly within and partly without the area of supply of the Liverpool Corporation; (2.) that the words “ may supply ” in s. 47 of the Electricity (Supply) Act, 1926, did not exclusively refer to the powers given by s. 5 of the Electric Lighting Act, 1909; (3.) that the Liverpool Corporation at the present time “ were supplying ” the L. M. & S. Railway with electricity for the general purposes of the company, part of which was used in the operation of capstans and traversers, and therefore “ for haulage or traction ” within the meaning of s. 47.

Held, therefore, that the Minister was competent to give his consent to the proposed supply, and that the action failed.

MOTION.

The Attorney-General at the relation of the Corporation

of Birkenhead brought this action against the Corporation of Liverpool and the London Midland & Scottish Railway, and moved therein for an order that the defendant Corporation be restrained until trial or further order from supplying or entering into any agreement to supply to the defendant railway company electricity for use by the defendant company on or in connection with the Wirral Railway, owned by that company, and for an order that the defendant company be restrained from receiving or purchasing or entering into any agreement to receive or purchase from the defendant Corporation a supply of electricity for use on or in connection with the Wirral Railway and from using on the said railway electricity supplied by the defendant Corporation.

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The motion, by agreement, was treated as the trial of the action, and the following agreed statement of facts was read by the learned judge as part of his judgment :—

“ The Birkenhead Corporation and the Liverpool Corporation are each of them authorized undertakers for the supply of electricity within their respective areas of supply under the Electricity (Supply) Acts, 1882–1936.

Pursuant to the Electricity Supply Act, 1926, each of the said Corporations is taking a supply of electricity from the Central Electricity Board for the purposes of their respective undertakings. The areas of supply of the said Corporations are shown, so far as is material to the present action, on the Map annexed hereto.

The defendants, the London Midland & Scottish Railway Company (hereinafter referred to as “ the company ”), who are an amalgamated railway company within the meaning of the Railways Act, 1921, and were incorporated by the North Western, Midland & West Scottish Group Amalgamation Scheme, 1923 (S. R. & O. 1923, No. 827), are the owners of a railway undertaking situate partly within and partly without the area of supply for electricity purposes of the Liverpool Corporation.

By virtue of the London Midland & Scottish Absorption (No. 1) Scheme, 1923 (S. R. & O. 1923, No. 1180), the company are the owners of the undertaking which prior to the said

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absorption scheme was the undertaking of the Wirral Railway Company and which by the said scheme was transferred to and vested in the company.

The Wirral Railway passes through the areas of supply of the Birkenhead Corporation, the Wallasey Corporation, and the Hoylake Urban District Council respectively, but no part thereof passes through or is situate within the area of supply of the Liverpool Corporation.

The Wirral Railway is physically connected at West Kirby with a railway known as the Birkenhead Railway, which was constructed under the Chester and Birkenhead Railway Act, 1837, and subsequent Acts, and which by virtue of the Birkenhead (Vesting) Act, 1861, became vested in the London & North Western Railway Company and the Great Western Railway Company jointly. The Wirral Railway has no other through rail connection with the other railways of the company.

The defendant railway company have adapted to electric traction that part of the Wirral Railway coloured purple on the said map and, being desirous for the purpose of working the same to obtain a supply of electricity of the character and description set out in the First Schedule hereto, to be used on or in connection with the Wirral Railway for any purposes of the company's undertaking, invited and received tenders for such supply from the Liverpool Corporation and the Birkenhead Corporation, each of whom were ready and willing to provide the required supply. The said tenders were at prices calculated as provided by s. 12 of the Electricity (Supply) Act, 1926.

The company was desirous of taking the supply from the Liverpool Corporation because their tender was materially lower than the tender of the Birkenhead Corporation, and with that object the company and the Liverpool Corporation by letters dated June 5 and July 15, 1936, jointly made application to the Minister of Transport pursuant to s. 47 of the Electricity (Supply) Act, 1926, (1) for his consent to the said supply being given by the Liverpool Corporation.

(1) See p. 459 *infra*.

An inquiry having been duly held, that consent was given.

It is the intention of the defendants that the said supply shall be given by the Liverpool Corporation and shall be taken by the company in the following manner:—

(a) The supply will be transmitted by the Liverpool Corporation along their own cables to the point marked A on the map annexed hereto being a point within their area of supply and will be delivered at the said point A to the company.

(b) From the point of delivery at the said point A the company will transmit the supply along their own cables to the point marked B on the said map, being a point on the Wirral Railway upon which the supply is to be used. The said cables will be carried from the said point A over the property and through a tunnel belonging to the Mersey Railway Company under a wayleave agreement with that company.

The company will pay to the Mersey Railway Company an annual wayleave charge of 50*l.* in respect of the passage of the cables through the said tunnel.

(c) The delivery by the Liverpool Corporation of the said supply at the said point A will be effected in the following manner.

At the said point A the company will lease from the Mersey Railway Company a site on the James Street Railway Station premises of that company and upon that site the company will construct a station or building in which will be installed a switchboard with all such switchgear, meters and fuses as may be necessary or convenient for enabling the Liverpool Corporation to deliver and the company to take delivery of the supply at the said switchboard and for enabling the company to control the user and further transmission of the supply from the point of delivery and for measuring the supply delivered.

The said site and the said station or building will be used solely for the above purposes and for no others and together with the switchgear will be under the control of the company, but subject to access by the Liverpool Corporation.

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(d) The supply will be given by the Liverpool Corporation at a pressure of 11,000 volts and, save in so far as it may be transformed to a lower voltage and used for the lighting and heating of the said station or building it will remain at that voltage until it reaches the said point B and will not be used within the area of supply of the Liverpool Corporation.

(e) If it appears convenient to the company so to do they will instal in the said station or building a transformer and will transform a portion of the supply to a lower voltage and will use the same for the lighting and heating of the said station or building ; but even if this is done such user will be very small in comparison with the user outside the area of supply of the Liverpool Corporation for the operation of the Wirral Railway.

The company will use the said supply for the lighting or heating aforesaid if it be held that such user is necessary in order to comply with the requirements of the Electricity Supply Act, 1926.

The Liverpool Corporation supplies and has at all material times supplied the company at various points within the said Corporation's area of supply with electricity, some part of which is used for the purpose of operating certain capstans, wagon hoists and traversers or travelling cranes. Particulars of the said capstans, wagon hoists and traversers or travelling cranes and of the points are set out in the Third Schedule to the statement. In each case the electricity so used is part of a supply which is provided by the Liverpool Corporation and used by the company for other purposes in addition to those specified above.

Through trains are run by the company between London (Euston) and New Brighton via Hooton, Parkgate and West Kirby over the Wirral Railway."

Hon. Sir Stafford Cripps K.C., Craig Henderson K.C. and Anthony Ward for the plaintiff. The agreement entered into is to supply electricity to undertakers outside the area of supply of the defendant Corporation and inside the area of the relator corporation. The only consent asked for or given has been given under s. 47 of the Electricity (Supply) Act,

1926, and the plaintiff contends that that section does not apply to the proposed supply, and that the Minister of Transport had no power to give his consent to such a supply.

The only power under which the London Midland & Scottish Railway can electrify the Wirral Railway is the special power to electrify that railway conferred by the Wirral Railway Act, 1900, s. 6. The powers contained in this special Act supersede any general powers contained in any earlier Act, such as the Railways Clauses Acts: see *James v. Dickenson* (1); *Attorney-General v. North Eastern Ry. Co.* (2), per Vaughan Williams L.J. The Wirral Railway had no power to contract with the Liverpool Corporation for electrification, as the railway is outside its area, and in this respect the London Midland & Scottish Railway have no greater power. For this purpose the Wirral Railway is still a separate undertaking. Though the ownership may change, the powers of the amalgamated company must still be limited by the powers given under the special Acts.

The principle of the maxim “*generalia specialibus non derogant*” applies to the case: *Corporation of Blackpool v. Starr Estate Co.* (3)

The Wirral Railway does not run into Liverpool, and it is not directly connected with other lines of the London Midland & Scottish Railway. The only connection is over the line of the Birkenhead Railway, which is not part of the London Midland & Scottish Railway but is vested jointly in the Great Western and London & North Western Railways under the Birkenhead Railway Act, 1861. The Birkenhead Railway is not mentioned in the Railways Act, 1921.

On general principles the defendant Corporation is not entitled to supply electricity to an undertaking which is wholly outside their area of supply: *Attorney-General v. County of London Electric Supply Co., Ltd.* (4); *Attorney-General v. Gravesend Corporation.* (5) Supply for the purposes of the Electricity (Supply) Act, 1926, means supply at the consumer’s

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(1) (1863) 14 C. B. (N. S.) 416,
433.

(2) [1906] 2 Ch. 675, 682.

(3) [1922] 1 A. C. 27.

(4) [1926] Ch. 542.

(5) [1936] Ch. 550.

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terminals, and delivery to a consumer at some place other than his terminals, even if the place of delivery is within the area of the undertakers, is prohibited by the Act: per Bennett J. in the latter case.

Turning to s. 47 of the Act, the words "may supply" mean "is authorized to supply." See Halsbury's Statutes, vol. vii., p. 819. Some special power must be referred to, and that can only be found in the present case in s. 5, sub-s. 1, of the Electric Lighting Act, 1909. The Corporation of Liverpool do not qualify for this at all.

Next, can it be said that the Corporation "are supplying" the London Midland & Scottish Railway with electricity "for haulage or traction"? There is no special supply for haulage or traction, but some of the current supplied for general purposes, power and lighting is used to operate certain capstans and traversers for shunting at different stations in Liverpool. It cannot be said that electrically operated capstans are used for "haulage or traction"; that refers to the power required for hauling electric trains over the railway.

The words "partly within and partly without" imply that the undertaking must be continuously partly within and partly without the area of supply. There is no such continuity here, as the Wirral Railway, if not still a separate undertaking, is a detached portion of the London Midland & Scottish undertaking.

Tyldesley Jones K.C., Alfred Tylor and Roger Pezzani for the defendants. The railway company can electrify their lines under s. 86 of the Railways Clauses Consolidation Act, 1845, which only operates when incorporated in a special Act. Sect. 6 of the Wirral Railway Act, 1900, is an enabling, not an excluding section, and the company under its powers could have erected its own generating station. There is nothing in that Act to prohibit the exercise of wider powers, such as are found in the Electricity (Supply) Act, 1926. The words "may supply" mean "may lawfully supply" but do not exclusively refer to s. 5 of the Electric Lighting Act, 1909. Sect. 47 of the Act of 1926 includes "railway, dock, harbour or canal undertakings" and is therefore much wider in its scope than

s. 5 of the Act of 1909, which only deals with supply to railways, tramways, and canals. SIMONDS J.

The words "partly within and partly without the area of supply" do not necessarily imply continuity of area. The word "continuously" is not to be found in the section. Such an undertaking as the Port of London Authority consists of a long series of disconnected docks, yet they constitute but one undertaking.

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The Wirral Railway is not now a separate undertaking. The Absorption Order of January 14, 1923, makes it part of the undertaking of the London Midland & Scottish Railway, and the different absorbed companies are dissolved. This contention is supported by *Attorney-General v. North Eastern Ry. Co.* (1)

There is nothing in s. 5 of the Railways Act, 1921, dealing with absorption schemes which disentangles any separate undertaking from the whole. The Wirral Railway, before its absorption, was itself an amalgamation of more than one line. The "undertaking" dealt with in s. 47 is for the purposes of this case the whole of the London Midland & Scottish Railway from Euston to Glasgow, including various disconnected parts. The Act is intended to enable undertakers to secure a supply of electricity on special terms from the Central Electricity Board: see s. 12 of the Act, under which the price of a supply in bulk is fixed.

As to the words "may supply" it is enough for Liverpool to supply as an authorized undertaker for general purposes, including haulage or traction. Some authorized undertakers have only limited powers of supply, and could not produce or supply sufficient for the purposes of a railway company. See Electricity Act, 1882, s. 4. The special powers of the Liverpool Corporation are contained in the Liverpool Corporation Act, 1921, and these have been extended by later Orders in Council. Therefore to explain the meaning of the words "may supply" it is quite unnecessary to go back to s. 5 of the Electric Lighting Act, 1909, as a source of legal authority.

In *Gas Light & Coke Co. v. South Metropolitan Gas Co.* (2)

(1) [1906] 2 Ch. 675.

(2) (1889) 62 L. T. 126.

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the House of Lords held that the gas was supplied where it was used. Here the supply is given to the London Midland & Scottish Railway at and no further than the company's terminals. The decision in *Attorney-General v. Gravesend Corporation* (1) is distinguishable on the facts. It has nothing to do with s. 47, which is purely an enabling section, in which no question of what or where are the consumer's terminals can arise. That case turned on the Electric Lighting (Clauses) Act, 1899.

Tomlin J. in *Attorney-General v. County of London Electric Supply Co., Ltd.* (2), said that the power and the obligation to supply were not necessarily coterminous.

[They also referred to *Drapers Co. v. London Passenger Transport Board*. (3)]

Sir Stafford Cripps K.C. in reply referred to s. 24 of the Electricity (Supply) Act, 1922. This section dealing with supply to railways is dealt with specially because it is a bulk supply. Here "supply for haulage or traction" assumes the same subject-matter as in the earlier section. The only powers for such supply are those contained in s. 5 of the Electric Lighting Act, 1909, and s. 24 of the Electricity (Supply) Act, 1922.

A general supply, some part of which may be used for haulage or traction, is not a supply for haulage or traction within s. 47.

On the facts there is no evidence that the electricity now being supplied to the railway by Liverpool is a supply for "haulage or traction."

Cur. adv. vult.

1937. April 29. SIMONDS J. [having read the agreed statement of facts, proceeded:] According to the First Schedule to the statement the electricity was to be supplied in the form of alternating current of a periodicity of fifty cycles and at a pressure of 11,000 volts, and the quantity to be required by the company was limited to 4000 kilowatts. This is relevant to a point made in the case. Particulars

(1) [1936] Ch. 550.

(2) [1926] Ch. 542.

(3) Ante p. 344.

of the capstans, wagon hoists and traversers are also given in the schedule to the agreed statement of facts and from that schedule it appears—I will take one typical instance—that one capstan of 15 horse-power located in Great Howard Street was used for hauling empty and loaded wagons for sugar traffic to and from a certain place. That may be taken as typical user of the capstans.

It is in this state of facts that the plaintiffs bring their action alleging that the Liverpool Corporation are not competent to give, nor the railway company competent to take, a supply of electricity for the purpose contemplated.

My task, if not a simple one, is at least simplified by this, that the defendants rely for both points on a single section, s. 47 of the Electricity (Supply) Act, 1926. So far as this case is concerned, if the right both to give and to receive is not conferred by that section, the action succeeds. Sect. 47 provides as follows: “Where any authorized undertakers may supply and are supplying within their district or area of supply electricity for haulage or traction to any company or authority being the owners or lessees of a railway, dock, harbour or canal undertaking situate partly within and partly without that district or area, such authorized undertakers may, subject to the consent of the Minister of Transport and to such limitations and conditions (if any) as he may prescribe either generally or in any particular case, so supply electricity to be used for any purposes of such undertaking, whether within or without such district or area of supply, and such company or authority may, subject to the consent of the Minister of Transport and to such limitations and conditions (if any) as he may prescribe either generally or in any particular case, use the electricity so supplied for any purposes of their undertaking for which they are entitled to use electricity.” Then there is a proviso which is immaterial.

For the purpose of construing this section, the language of which appears to be reasonably clear, I have been taken, and rightly taken, through a series of Acts which, on the one hand, conferred on authorized undertakers the right to supply electricity and, on the other hand, conferred on railway

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companies the various powers necessary for them to carry on their undertakings, including the power to take a supply of electricity. Having considered them so that I am in a position to interpret s. 47 not in isolation but in its proper place in the legislative history of electricity and railway undertakings, I see no reason to give the section any other meaning than that which its words naturally bear.

I will first deal with the position of the defendant railway company. Are they, for the purposes of s. 47, owners of a railway undertaking situate partly within and partly (namely, as to the Wirral Railway) without the area of supply of the Liverpool Corporation? If they are not, the Minister of Transport had no authority to give the consent which he in fact gave, and this action must succeed.

On the part of the plaintiffs it is urged that they are not such owners. The Wirral Railway (thus runs the argument) does not, for the purpose of s. 47 at least, form part of a railway undertaking of which the company are owners; it is itself a railway undertaking of which the company are owners, just as it was before its absorption in 1923 a railway undertaking of which the Wirral Company were owners. In other words, s. 47 must be read as if in it "railway undertaking" meant the original statutory unit, whatever it might be, which could properly be called a railway undertaking, with the result that the company have no larger powers conferred on them in respect of the Wirral Railway than the Wirral Company would have had if there had been no absorption.

This argument has been fortified by references to the Railways Clauses Acts and, in particular, to Part V., which deals with amalgamations, of the Railways Clauses Act, 1863, and to the well known principle that, when Parliament in an earlier statute directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that, if by a subsequent statute the Legislature lays down any general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is

specially declared: see per Lord Haldane in *Blackpool Corporation v. Starr Estate Co. Ltd.* (1)

On these grounds it is contended that the company's power to take a supply of electricity for the Wirral Railway remains that which was conferred by s. 6 of the Wirral Company's own Act of 1900 (63 & 64 Vict. c. xci.), and has not been enlarged by the general language of a section of a general Act.

I am unable to give effect to this contention. It appears to me that from the moment when the absorption scheme became operative, by s. 5 of which it was provided that the undertaking of, among other companies, the Wirral Company should be transferred to and absorbed by and form part of the undertaking of the company, a reference to the undertaking of the company in any general legislation must, in the absence of any excluding context, be taken to mean the whole railway undertaking, including all those undertakings which may have been transferred to and absorbed in it. I see no valid reason why, for the purpose of construing s. 47, I should disintegrate the railway company's undertaking as it exists to-day into the constituent parts out of which it has been formed. To do so would go far to deprive the company of the benefits which amalgamation was meant to achieve. Nor, in my judgment, can the principle in *Blackpool Corporation v. Starr Estate Co., Ltd.* (1), be usefully invoked by the plaintiffs. The Wirral Company, in respect of their undertaking, were enabled by s. 6 of their Act of 1900 to obtain a supply of electricity from certain sources. It was an enabling section and nothing else. By s. 47 of the Act of 1926 a wider power was conferred on a railway company. Why should I exclude from its scope the company into whose undertaking the Wirral Railway undertaking has been absorbed? These are not circumstances in which the maxim "generalalia specialibus non derogant," of which Lord Haldane's words are an elaboration, can have any application.

So much for the company. Of their competence to receive whatever supply they can obtain under s. 47, and to use it

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SIMONDS J. within or without the area of supply for any purpose of their undertaking, I have no doubt.

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What of the authorized undertakers, the Liverpool Corporation? They are competent to give the supply to the company if, and only if, it can be predicated of them that they "may supply and are supplying within their district or area of supply electricity for haulage or traction" to the company.

First, it has been argued that it was not true to say of them that they "may supply." These words, it is said on behalf of the plaintiffs, refer back exclusively to s. 5 of the Electric Lighting Act, 1909. Sub-s. 1 of that section provides: "Any local authority, company or person authorized to supply electricity in any area may, with the consent of the Board of Trade, supply at any point within that area electricity for the purposes of haulage or traction on any railway, tramway or canal situate partly within and partly without that area, and for the purposes of lighting vehicles and vessels used on any such railway, tramway or canal." Undoubtedly the Liverpool Corporation have not obtained any consent of the Board of Trade to give a supply of electricity to the company. Accordingly, if the true view is that the words "may supply" in s. 47 of the Act of 1926 refer back to this sub-section alone, it follows that the Liverpool Corporation do not bring themselves within the section.

I see no reason for so construing the words "may supply." In the first place, it is to be noticed that, whereas s. 5 of the Act of 1909 refers to haulage or traction on a railway, tramway or canal, s. 47 of the Act of 1926 refers to a supply for haulage or traction to owners or lessees of a railway, dock, harbour or canal undertaking. The two sections do not deal with the same subject-matter and, if the plaintiffs are right, the result would be that s. 47 never could be brought into operation in the case of a dock or harbour undertaking, for docks and harbour undertakings are not within s. 5 and it is a condition of s. 47 operating that s. 5 should first have been applied. From such a strange interpretation I should in any case recoil. In the second place, I find a simple enough explanation of the words "may supply" in the fact that an undertaker may be

properly described as an authorized undertaker and yet its electric power may be so limited that it may not supply electricity for haulage or traction to such undertakings as are mentioned in s. 47. There are, then, authorized undertakers which may and authorized undertakers which may not supply electricity for such purposes to such undertakings. It is clear from s. 175 of the Liverpool Corporation Act, 1921 (11 & 12 Geo. 5, c. lxxiv.), that the Liverpool Corporation are in the former category.

Next, can it be said that the Liverpool Corporation "are supplying" within their area of supply electricity for haulage or traction to the company?

On behalf of the plaintiffs it is urged that the words "for haulage or traction" refer to a special supply for that purpose only and that there is no such supply by the corporation to the company. They refer to other sections where supply for haulage or traction is mentioned and in particular to s. 12 of the Act of 1926, which imposes on authorized undertakers the obligation, if they supply electricity to a railway company for the purpose of haulage or traction, to supply it on the same terms as those on which they have themselves obtained it from the Central Electricity Board. In effect, they say that it cannot be said of authorized undertakers that they "are supplying," within s. 47, unless s. 12 has been brought into play and it can be ascertained what are the terms of supply.

I do not think that so narrow an interpretation of s. 47 is justifiable. It certainly cannot in all cases be a condition of s. 47 applying that s. 12 should already have been applied, for s. 12 refers to a railway company only and s. 47 to owners or lessees of a railway, dock, harbour or canal undertaking. Moreover, even in the case of a railway company, s. 12 is one which confers a benefit and does not impose any obligation on the railway company. Its terms might not be observed and yet there might be a supply for haulage or traction.

I prefer the wider construction for which the defendants contend. It is, in my view, sufficient to bring the company within the section if I find, as on the agreed facts I must, that there is a supply for the general purposes of the company,

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The company and the Corporation being thus brought within the section, I see no further difficulty, for it follows that the Minister of Transport was competent to give his consent to the latter supplying and to the former using electricity for any purposes of the railway undertaking, whether within or without the area of supply of the Corporation. He has, after due inquiry, given his consent to the proposed supply and user and that ends the matter.

The motion must accordingly be refused and the action dismissed with costs. I think that the proper form of order is : No order on the motion, except that costs be costs in the action, and the action be dismissed, with costs.

Solicitors : *Robins, Hay & Waters, for E. W. Tame, Town Clerk, Birkenhead ; Alexander Eddy.*

H. L. L.

In re GLYN VALLEY TRAMWAY COMPANY.SIMONDS
J.

[00446 of 1936.]

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March 17;
April 22;
May 6.
—

Company—Statutory company—Undertaking closed down—Voluntary winding-up—Debentures—Rights of debenture-holders—Extent of charge on assets—Priority over unsecured creditors—Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), Part III.—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), Part IX., s. 333.

A tramway company, created by private Act of Parliament incorporating the Companies Clauses Acts, was closed down, and, after being registered as a limited company under Part IX. of the Companies Act, 1929, was voluntarily wound up. The liquidator took out a summons to determine (inter alia) the rights of debenture-holders as against unsecured creditors, and the extent of the charge created by the debentures:—

Held, that, the tramway having altogether ceased to exist as a going concern, the debenture-holders were entitled to a charge on all the assets, including proceeds of sale of realized assets and uncalled capital, in priority to the claims of unsecured creditors.

Gardner v. London, Chatham and Dover Ry. Co. (1867) L. R. 2 Ch. 201 explained and distinguished.

SUMMONS.

The Glyn Valley Tramway Company, a statutory company, for many years operated tramways in the Glyn Valley in the county of Denbigh under the provisions of the Glyn Valley Tramway Acts, 1870, 1878, and 1885.

By a conveyance dated August 10, 1891, between Colonel Richard Myddleton, tenant for life of the Chirk Castle estates, and other parties, and the company, certain land was conveyed to the company for the purposes of their undertaking in consideration of an annual rentcharge of 114*l.* 11*s.* 3*d.*, charged on the lands thereby assured and on the tolls and rates of the tramway authorized by the Glyn Valley Tramway Act, 1885. The conveyance contained a proviso that in the event of the undertaking being abandoned by the company the land conveyed should be deemed to be superfluous land within the Lands Clauses Consolidation Act, 1845. The company also created a series of debentures charged on its

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About the year 1932 the company ceased to carry on its business at a profit, and in 1935, with a view to liquidation, it was registered as a limited company under Part IX. of the Companies Act, 1929. On August 22, 1935, the Registrar of Companies gave his certificate, under s. 329 of the Act, that the Glyn Valley Tramway Company, Ltd., was registered under the Companies Act. On October 7, 1935, an extraordinary resolution was passed for the winding-up of the company. The assets of the company were insufficient to discharge its liabilities in full. A sum of 2048*l.* remained uncalled on the preference shares.

The liquidator having found it impossible to sell the land, which consisted of a long narrow strip unsuitable for an ordinary purchaser, applied to the Court for leave to disclaim the property comprised in the conveyance of 1891. The summons also raised various questions arising on the liquidation as to the persons entitled to the land to be disclaimed, the effect of the rentcharge, and the respective priority of the rentcharge and the debentures. After the hearing of part of the summons a further question was raised—namely, whether the debentures or some of them constituted a charge on the undertaking and assets of the company, or on some and if so what part thereof, ranking in priority to the said rentcharge.

SIMONDS J. held that the rentcharge was charged only on the land sold and on the rates and tolls and not on the undertaking generally, and that it ranked in priority to the debentures as regards the assets on which it was charged. The further question, which alone calls for a report, as to the extent of the charge created by the debentures, was then argued.

W. Geddes for the liquidator of the company.

Lionel Cohen K.C. and *T. D. Divine* for Colonel Myddleton, the tenant for life of the Chirk Castle estates, his mortgagees and the trustees of the settlement affecting the land (unsecured creditors).

The statutory undertaking having ceased to exist, the debentures now create no charge on the company's assets and no priority over its ordinary creditors. The charge in this case has not the same effect as a charge created by a limited company. The registration under Part IX. of the Companies Act, 1929, was not effected until after all the debentures were created, and that registration cannot confer any new right. *Gardner v. London, Chatham and Dover Ry. Co.* (1) is an authority covering this point. And see *In re Hull, Barnsley and West Riding Junction Ry. Co.* (2), in which it was held that the creditors of a railway company in respect of mortgages, bonds, or debenture stock obtained no lien or charge on the proceeds of sale of surplus lands sold on the application of creditors of the company. Cotton L.J., at p. 127, said that in his opinion no charge was created by s. 23 of the Railway Companies Act, 1867, or independently of that Act, over surplus land or other property of the company.

C. W. Turner for mortgagees.

Fergus Morton K.C. and *Cozens-Hardy Horne* for executors of certain debenture-holders.

We submit that the charge created by the debentures still attaches. If the argument for the unsecured creditors is correct very surprising results would follow.

The case of *Gardner v. London, Chatham and Dover Ry. Co.* (1) only deals with the remedies of a debenture-holder when the company is still a going concern. The debentures create a floating charge, but no specific charge on any assets of the company, until crystallized by winding-up. The decision in *Furness v. Caterham Ry. Co.* (3) shows that a railway debenture-holder is a mortgagee of the undertaking. The Railway Companies Act, 1867, s. 23, applies, though the Act is not incorporated with the private Acts.

In *In re Panama, New Zealand and Australian Royal Mail Co.* (4) the decision in *Gardner's* case (1) was distinguished on the ground that there the subject-matter of the debentures was a permanent railway, which could not be mortgaged or

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(1) (1867) L. R. 2 Ch. 201.

(2) (1888) 40 Ch. D. 119.

(3) (1859) 27 Beav. 358.

(4) (1870) L. R. 5 Ch. 318.

SIMONDS sold or dealt with in any way. But here the liquidator has sold all the realizable property of the tramway and the undertaking is defunct—it has ceased to be an undertaking at all. In the *Panama* case it was held that the debentures created a charge on all property of the company, past and future, under the word “undertaking.”

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[They also referred to *Marshall v. South Staffordshire Tramways Co.* (1) and *In re Hull, Barnsley, etc., Ry. Co.*, per Lindley L.J. (2)]

Roger Turnbull for other debenture-holders.

Cohen K.C. replied.

Cur. adv. vult.

1937. May 6. SIMONDS J. The Glyn Valley Tramway Company was incorporated in the year 1870 under the Glyn Valley Tramway Act of that year, and under that and subsequent Acts of the years 1878 and 1885, to which it is unnecessary to refer, it continued actively to carry on and operate a tramway in the county of Denbigh until the year 1935. In that year, as it had been unable since 1932 to trade at a profit, it took the steps which resulted in its liquidation and in these proceedings. It first obtained registration under Part IX. of the Companies Act, 1929, so that all the relevant provisions of that part of the Act came into operation. It then passed an extraordinary resolution on October 7, 1935, that the company should be voluntarily wound up and that one George Henry Haswell should be the liquidator. In the winding-up proceedings the liquidator has applied to the Court to determine, among other questions, the question what are the rights inter se of the holders of debentures of the company and its unsecured creditors.

The debentures of the company have, it is conceded, been validly created and issued under the provisions of one or other of the Acts of 1870, 1878 and 1885, with which Part III. (relating to debenture stock) of the Companies Clauses Act, 1863, was incorporated. The debentures are in the form

(1) [1895] 2 Ch. 36.

(2) 40 Ch. D. 119, 130.

which is familiar in such kinds of undertaking and are intended to secure an aggregate principal sum of 8500*l.*, the whole of which, together with some arrears of interest, is outstanding. By each debenture the company, in consideration of the sum paid to it, assigns to the lender, his executors, administrators and assigns, the undertaking of the company and all future calls on shareholders and all the tolls and sums of money arising by virtue of the said Acts, and all the estate, right, title and interest of the company in the same to hold to the lender, his executors, administrators and assigns until the said sum with interest at the rate therein mentioned be satisfied. It then provides for payment of the principal at the end of a certain number of years and for payment of interest half-yearly on stated days.

The liquidator, having ceased to carry on the undertaking, and having now, so far as they are realizable, realized the assets of the company, except that he has still to get in some debts and to call up certain uncalled capital, has and will have a sum insufficient to satisfy the claims of debenture-holders and unsecured creditors of the company. In these circumstances the latter claim that they are entitled to rank *pari passu* with the former against the assets of the company available in the winding-up. It is this claim, involving as it does the proposition that the debentures do not confer any priority on their holders, which I have to examine.

The claim is one which on its face appears to be untenable; for the debenture, although it does not use the word “charge,” is in a form apt to create in its holder an equitable interest which must rank before an unsecured creditor. That which is assigned is the undertaking of the company and all future calls on shareholders. “Undertaking” is a word of the widest import meaning the undertaking or works, of whatever nature, authorized by the several special Acts to be executed. (See s. 2 of the Companies Clauses Consolidation Act, 1845, which is incorporated with the special Acts.) If the debenture creates an equitable interest in the undertaking and works, so must it also in the proceeds of sale in the hands of the liquidator.

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It is urged, however, on behalf of the unsecured creditors that I cannot give to the debenture the meaning and effect which it plainly appears to me to bear, because I am debarred from doing so by authority which is binding on me. The argument is founded on the well known decision of Lord Cairns and Turner L.J. in *Gardner v. London, Chatham and Dover Ry. Co.* (1) That case decided points of importance which are, I think, correctly stated in the headnote—namely, that a mortgage debenture in such a form as that before me does not give the holder a specific charge on the lands of the company or the proceeds of sale of them so as to entitle him to an order for a receiver of the sale moneys or interim rents ; that the “undertaking” of the company which is pledged in or assigned by such a debenture is the going concern created by the Act, which cannot be broken up or interfered with by the debenture-holder ; and that the Court will not appoint the manager of a railway. But these were matters which arose with regard to a company which was still actively carrying on the undertaking for the purpose for which it had been incorporated by statute, and it would in my judgment give to the decision an effect which it was never intended to have if I took from their context certain observations of Lord Cairns in particular and on them founded the proposition for which the unsecured creditors here contend—namely, that the debenture on its true construction does not create a charge on the proceeds of sale of the undertaking or any assets in the winding-up of the company.

As I read *Gardner v. London, Chatham and Dover Ry. Co.* (1) it is directed to nothing else than to ascertain the rights and remedies of the debenture-holder while the statutory company is a going concern, and determines that while it is a going concern it cannot be interfered with by the exercise of a mortgagee's rights. It is for one and the same reason that the Court will not appoint a manager and that the mortgagee will not be allowed to intervene, or, as Lord Cairns put it, the undertaking is to be treated as a fruit-bearing tree the produce of which is the fund dedicated by the contract

(1) (1867) L. R. 2 Ch. 201.

to secure and pay the debt. But that case did not purport to determine what the result would be if the axe were lawfully laid at the root of the tree. On the contrary, the undertakers had not taken and did not contemplate taking the steps which were necessary to be taken before they could lawfully abandon their undertaking.

A case more nearly approaching that which I have to decide is *Furness v. Caterham Ry. Co.* (1), where, a railway undertaking having been sold under the authority of an Act of Parliament, it was held that the debenture-holders were entitled to the proceeds of sale in priority to judgment-creditors of the company. That case was cited and not disapproved in *Gardner v. London, Chatham and Dover Ry. Co.* (2), and was cited and approved in *In re Woking Urban Council (Basingstoke Canal) Act*, 1911 (3), where Swinfen Eady L.J., speaking of similar debentures, said: "Again it has been decided that a holder of such mortgage debentures 'of the undertaking' is not entitled to foreclosure or sale: *Furness v. Caterham Ry. Co.* (4): although if the property be sold and conveyed under the authority of an Act of Parliament, the debenture-holders are entitled to be paid out of the proceeds of sale: *Furness v. Caterham Ry. Co.* (1)."

It cannot, in my judgment, make any difference whether the undertaking is sold as a whole for a lump sum or whether it is realized piecemeal in the liquidation of the company. In the latter case as in the former I can rely on the authority which I have cited for the proposition that the debenture-holders are entitled to priority.

It may be further observed that the debenture purports to assign not only the undertaking of the company but also all further calls on shareholders, and, while it is not clear on the evidence from what source the liquidator has obtained the moneys which he has in hand, some substantial sums he has or will have from the calls made or to be made on the shareholders. This sum, as I have said, is specifically assigned by the debenture and, though it may be that under

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(1) 27 Beav. 358.

(2) L. R. 2 Ch. 201.

(3) [1914] 1 Ch. 300, 314.

(4) (1858) 25 Beav. 614.

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s. 43 of the Companies Clauses Act, 1845, the company could, notwithstanding the assignment, receive and apply calls for the proper purposes of its undertaking, yet this provision can have no operation when the undertaking has been in effect abandoned. Thereupon the assignment must, in my judgment, be effective to give to the debenture-holder the right which it purports to give him in respect of uncalled capital.

For these reasons I shall declare that the debenture-holders are entitled in the liquidation of the company to be paid in priority to the unsecured creditors. There was at one time some question raised how the debenture-holders ranked inter se. That has now gone ; they rank *pari passu* and will be dealt with accordingly.

Solicitors : *Lovell, Son & Pitfield ; Lee & Pembertons ; Hammond & Richards ; Rider, Heaton, Meredith & Mills, for Birch, Cullimore & Co., Chester.*

H. L. L.

In re BALLARD'S CONVEYANCE.CLAUSON
J.

[1936. B. 2742.]

1937

March 16,
17, 18;
April 6;
May 3.

Covenant—Restrictive covenants running with the land—"Concerning or touching" the land—Whether enforceable by assignee of land.

Where a restrictive covenant purports to have been annexed to land so as to run with it, and does not in fact "concern or touch" the whole of the land, the annexation is ineffective, and the covenant does not run with the land and cannot be enforced by any owner of the land other than the covenantee. Even if there is some part of the land which the covenant does "concern or touch," the Court will not sever it and treat it as annexed to that part.

Rogers v. Hosegood [1900] 2 Ch. 388 considered and distinguished.

ADJOURNED SUMMONS.

This was an application by Herbert Cassin Wright (hereinafter called "the applicant") for a declaration that the property comprised in a conveyance of June 28, 1906, executed in his favour by Mrs. Emily Harriett Ballard, was no longer affected by any of the restrictions contained in that conveyance and that those restrictions were not enforceable against him. The respondents to the summons were Childwick Bury Stud, Ltd., who claimed to be in a position to enforce the restrictions.

The property in question, which consisted of two closes of together about 18 acres, was in April, 1906, put up for auction as Lots 2 and 3 with a property known as Bamville Farm as Lot 1. Condition 8 of the conditions of sale provided that the several lots were sold and would be conveyed subject to certain scheduled conditions; and it was provided that every purchaser should in and by the assurance to him of the purchased property enter into a proper covenant, framed so as to bind his representatives and assigns, with the vendor and his heirs and assigns and successors in title owners for the time being of the Childwickbury Estate of Sir John Blundell Maple deceased, to perform and observe the several conditions and stipulations so far as the same related to, affected or concerned the purchased property.

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The applicant was the successful bidder at the auction, and by a conveyance dated June 28, 1906, the property was conveyed to him in fee simple by Mrs. Emily Harriett Ballard. From the recitals in the conveyance it appeared that Sir John Blundell Maple, who had died on November 24, 1903, seised of the property, had by his will of November 24, 1897, devised his Childwick Estate and all other his lands and hereditaments in the county of Hertford to his wife (who had since his death become Mrs. Ballard) during her life ; and by the conveyance Mrs. Ballard was expressed to convey the property in exercise of her Settled Land Act powers. The property was described as having formed part of Bamville Wood Farm. The property was conveyed with the benefit of the conditions and stipulations set forth in the schedule so far as the same related to or affected a certain piece of neighbouring land coloured green upon the plan upon the conveyance (being the land which had been put up for sale as Lot 1 at the sale at which the property, Lots 2 and 3, had been purchased by the applicant) in the event of and after the sale thereof to a purchaser or purchasers. The property was also conveyed subject to the same conditions and stipulations so far as they related to, affected or concerned the property so conveyed.

The conveyance contained a covenant in the following terms : " The said Herbert Cassin Wright doth hereby covenant with the said Emily Harriett Ballard her heirs and assigns and successors in title owners from time to time of the Childwickbury Estate of the said Sir John Blundell Maple that he the said Herbert Cassin Wright his heirs and assigns will perform and observe the conditions and stipulations set forth in the schedule hereto so far as the same relate to affect or concern the said premises hereinbefore expressed to be hereby conveyed."

The schedule contained provisions forbidding erection of buildings other than a private dwelling-house on the property, and forbidding erection of buildings except garden or farm buildings otherwise than of red brick and in conformity with plans and specifications previously submitted to and approved of in writing by the vendor or her surveyor ; also provisions

laying down the minimum value of the houses to be erected and the minimum area of land to be attached to each house ; also provisions against user of the property, or any building erected on it, for certain specified purposes or for any purpose which should be or tend to become a nuisance or annoyance to the vendor or the owners or occupiers of any other part or parts of " the above-mentioned estate " or any of them, or for any trade or business ; and condition 4 prescribed that any question as to the value of any house built or otherwise under or in connection with the stipulations should be determined by the vendor's surveyor for the time being. Then followed a restriction against burning bricks and against permitting movable dwellings and deposit of rubbish.

By condition 6 it was provided that nothing in the conditions or in the conveyance contained was to oblige the vendor to enforce the foregoing stipulations or any of them in respect of any part of the property, or preclude her from waiving or varying, by licence or otherwise, such stipulations or any of them in respect of any part of the property, and she was to be at liberty, if she should think fit so to do, effectually to release any part of the property from such stipulations or any of them.

Condition 7 provided that in the stipulations " the property " meant the entire property shown in the plan (i.e., the property conveyed and also Lot 1 already mentioned) : and condition 8 provided that the expression " the vendor " was to be deemed to include Mrs. Ballard, her successors in title owners of any part of " the above mentioned estate " for the time being remaining unsold, and that the expression " the purchaser " should include the applicant, his heirs and assigns.

At the auction at which the applicant purchased the property as Lots 2 and 3, the remaining lot, referred to as Lot 1, though knocked down to a purchaser, was not effectually sold, and remained in Mrs. Ballard's hands.

On April 17, 1907, Mrs. Ballard sold and conveyed the whole of the land left to her by Sir John Blundell Maple and described in the will, with the exception of the land referred to as Lot 1, to Mr. J. B. Joel, by a conveyance which contained no reference

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CLAUSON at all to the stipulations and conditions scheduled to the
J. applicant's conveyance or to the covenants entered into with
1937 Mrs. Ballard by the applicant. After the conveyance to
BALLARD'S Mr. Joel, the only land in the neighbourhood in which
CONVEY- Mrs. Ballard retained any interest was Lot 1.
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In the year 1908 Mrs. Ballard sold and conveyed Lot 1 to a purchaser in whose conveyance there was no reference to the stipulations and conditions or to the applicant's covenant.

Mrs. Ballard died in or about the year 1919. On June 26, 1919, Mr. Joel conveyed to the respondents the whole of the property conveyed to him by Mrs. Ballard.

The applicant by his summons under s. 84 of the Law of Property Act, 1925, asked for a declaration that no part of the property in question was any longer affected by any of the restrictions contained in the conveyance of June 28, 1906; or in the alternative that it might be declared whether the said restrictions or any of them were at the date of the summons enforceable and, if so, by whom.

Charles Harman K.C. and *A. G. N. Cross* for the applicant referred to *In re Sunnyfield* (1); *Renals v. Cowlishaw* (2); *Rogers v. Hosegood* (3); *Reid v. Bickerstaff* (4); and *In re Union of London & Smith's Bank Ltd.'s Conveyance*. (5) If the covenant is annexed to the land now owned by the respondents, the applicant is in a cleft stick. He cannot build at all, as there is now no "vendor" or "her surveyor" to "approve" within the meaning of the schedule to his conveyance from Mrs. Ballard.

The intention of that conveyance was to protect Mrs. Ballard. The Court cannot draw from the conveyance the implication that the covenant was intended to benefit the whole of the land. [They referred to *In re Sunnyfield*. (1)] The covenant shows that Mrs. Ballard's intention was to make the restrictions the local law of the three lots, and that she reserved the right to waive them: and she must be taken to have

(1) [1932] 1 Ch. 79.

(2) (1878) 9 Ch. D. 125.

(3) [1900] 2 Ch. 388.

(4) [1909] 2 Ch. 305.

(5) [1933] 1 Ch. 611.

waived them when she sold Lot 1 in 1908, and conveyed it without any reference to restrictions. Again, there was no reference whatever to restrictions in the conveyance to Mr. Joel, and in the face of that omission the Court will not assume that he then received the benefit of them.

It is reasonably plain that Mrs. Ballard's intention in taking the covenant from the applicant was not to create a restriction which would run with the land for the benefit of the whole estate, but to protect herself by means of a covenant on which she could sue.

Fergus Morton K.C. and *E. M. Winterbotham* for the respondents. It is quite clear that the covenant does run with the land. Mr. Joel and any surveyor employed for the purpose by him will satisfactorily conform to the definition of "vendor" and "surveyor" in the schedule to the applicant's conveyance. The respondents rely on *Rogers v. Hosegood* (1) and *In re Sunnyfield*. (2) The covenant can be, and is, attached to the whole of the estate, and the respondents are entitled to the benefit of it : *In re Union of London & Smith's Bank Ltd.'s Conveyance*. (3)

If, in the present case, the covenant does not concern or touch the whole of the respondent's land, but only part of it, the Court has the power to treat it as separable, and to say that it is effective with regard to that part of the land : *London County Council v. Allen*. (4)

A. G. N. Cross in reply. On the true construction of the conveyance to the applicant, it is clear that the benefit of the covenant will run, if at all, only in favour of some one who is the owner of the whole estate : *Rogers v. Hosegood*. (1) The expression "the vendor" cannot include any one claiming under Mrs. Ballard by purchase.

Cur. adv. vult.

1937. May 3. CLAUSON J. [after stating the facts as above set out continued:] In *Osborne v. Bradley* (5) Farwell J. classified such covenants as that now in question as falling

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(1) [1900] 2 Ch. 388.

(2) [1932] 1 Ch. 79.

(3) [1933] 1 Ch. 611.

(4) [1914] 3 K. B. 642.

(5) [1903] 2 Ch. 446, 450.

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J. simply for the vendor's own benefit ; (2.) where the covenant
1937 is for the benefit of the vendor in his capacity as owner of
BALLARD'S a particular property ; and (3.) where the covenant is for the
CONVEY- benefit of the vendor in so far as he reserves unsold property,
ANCE, and also for the benefit of other purchasers as part of what is
In re. called a building scheme.

It appears to me to be reasonably clear that the covenant in the present case does not fall within the first class. It is not a covenant entered into simply for the vendor's own benefit ; it is one entered into for the benefit of the vendor in her capacity as owner of some property or other. If the covenant had to be construed as falling within the first class, it is not easy to see how there could be any action based upon it in respect of a breach occurring after the covenantor's death. That, however, is not a point which I need pause to consider.

I gathered that it was not suggested in the present case that the covenant could be treated as falling within class (3.). It is possible that there was an idea, when Lot 1 was put up for sale with the property now in question, of having some kind of " local law " governing this property and Lot 1 ; but the sale of Lot 1 proved abortive, and on its resale no attempt seems to have been made to subject it to any such local law. The present case proceeded, in my opinion rightly, on the footing that the considerations which apply in the case of a covenant falling within class (3.) are absent from the present case.

I thus feel no doubt that the covenant with which I am concerned is to be construed as a covenant for the benefit of the vendor as owner of a particular property. The question who can be sued upon the covenant, not being the actual covenantor, or, in the case of a breach by the covenantor, his personal representative, depends, or may depend, upon equitable considerations. When, however, the question is who can sue on such a covenant, the question becomes one of law in the strict sense. The covenant can be enforced by the covenantee while owner of the particular property in respect of which the covenant is taken ; it can also be

enforced by the person who becomes owner of that property by a title derived from the original covenantee, provided that the covenant is one which comes within the category of covenants the benefit of which can be made to run with the land, using that expression in the strict sense of running with the land at law.

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The first question which arises for consideration is: What is the land for the benefit of which the covenant was taken? The next question will be: Is the person who claims to enforce the covenant seised of that land by title derived through or under the original covenantee? The remaining question will be: Is the covenant one which, in the circumstances of the case, comes within the category of a covenant the benefit of which is capable of running with the land for the benefit of which it was taken?

In the present case the first question, namely, what is the land for the benefit of which the covenant was taken, is, on the documents and the facts, one of some difficulty. On reading the covenant itself the answer would seem to be: "the Childwickbury Estate of Sir John Blundell Maple"; but on turning to the eighth stipulation it appears that in the stipulations the phrase "the vendor" includes Mrs. Ballard, her successors in title "owners of any part of the above-mentioned estate for the time being unsold." A question of fact was raised whether the Childwickbury Estate included the piece of land which I have spoken of as Lot 1. The conveyance to Mr. Joel, already mentioned, was put in. It appears that Sir John Blundell Maple possessed two estates, one known as Childwick or Childwickbury, and one known as Ayres End. I am not satisfied that Bamville Farm, which comprised Lot 1, and also the property conveyed by Mrs. Ballard to Mr. Wright, was at the date of the conveyance to the applicant part of either of those two estates. When Mrs. Ballard conveyed to Mr. Joel what is described in the conveyance to him as the Childwickbury Estate, the Childwick Estate and the Ayres End Estate were comprised in the conveyance, but Lot 1 was not so comprised, being shortly afterwards sold to another purchaser.

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I do not think that I can fairly construe the phrase "Childwickbury Estate" in the conveyance to the applicant as including Lot 1. I come to the conclusion, as the evidence stands, that the phrase indicates the property which was at a later date in fact conveyed to Mr. Joel as the Childwickbury Estate and specifically described in detail in the schedule to the conveyance to him. I accordingly conclude that the land for the benefit of which the covenant was taken is the Childwickbury Estate as I have indicated it, and there is no doubt that the whole of that land is now vested in the respondents, Childwick Bury Stud, Ltd., under a title derived ultimately from Mrs. Ballard, the covenantee.

It was suggested that I could read clause 7 of the stipulations and conditions in the applicant's conveyance as confining the operation of the covenant so as to restrict the benefit of it to such parts of the Childwickbury Estate as were for the time being unsold; i.e., remained the property of Mrs. Ballard and those claiming title through or under Sir John Blundell Maple otherwise than by virtue of a purchase. The drafting is certainly very confused, but I do not feel justified in thus cutting down the ambit of the covenant.

I accordingly hold that the land for the benefit of which the covenant was taken was the land (about 1700 acres) now vested in Childwick Bury Stud, Ltd., by conveyance from Mr. Joel, and that the fact that they claim by virtue of a purchase from Mrs. Ballard would not affect their title to sue.

That brings me to the remaining question, namely: Is the covenant one which, in the circumstances of the case, comes within the category of a covenant the benefit of which is capable of running with the land for the benefit of which it was taken? A necessary qualification in order that the covenant may come within that category is that it concerns or touches the land with which it is to run: see per Farwell J. in *Rogers v. Hosegood*. (1) That land is an area of some 1700 acres. It appears to me quite obvious that while a breach of the stipulations might possibly affect a portion of that area in the vicinity of the applicant's land, far the largest

(1) [1900] 2 Ch. 388, 395.

part of this area of 1700 acres could not possibly be affected by any breach of any of the stipulations. CLAUSON
J.

Counsel for the respondents asked for an adjournment in order to consider whether they would call evidence (as I was prepared to allow them to do) to prove that a breach of the stipulations or of some of them might affect the whole of this large area. However, ultimately no such evidence was called. 1937
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The result seems to me to be that I am bound to hold that, while the covenant may concern or touch some comparatively small portion of the land to which it has been sought to annex it, it fails to concern or touch far the largest part of the land. I asked in vain for any authority which would justify me in severing the covenant and treating it as annexed to or running with such part of the land as is touched by or concerned with it, though as regards the remainder of the land, namely, such part as is not touched by or concerned with the covenant, the covenant is not and cannot be annexed to it and accordingly does not and cannot run with it. Nor have I been able through my own researches to find anything in the books which seems to justify any such course. In Rogers v. Hosegood (1) the benefit of the covenant was annexed to all or any of certain lands adjoining or near to the covenantor's land, and no such difficulty arose as faces me here; and there are many other reported cases in which, for similar reasons, no such difficulty arose. But the requirement that the covenant, in order that the benefit of it may run with certain lands, must concern or touch those lands, is categorically stated by Farwell J. in the passage I have cited, in terms which are unquestionably in accord with a long line of earlier authority.

I would observe that the construction of the document and the intention of the parties to be gathered therefrom is material on the question what is the area of land to which the covenantor and the covenantee intended to annex the benefit of the covenant, or, in technical language, what is the land with which the parties intended the covenant to run; but that on the question whether, in the circumstances of the

(1) [1900] 2 Ch. 388.

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case, this covenant is capable of being annexed to or of running with the land to which it is sought to annex it, it is necessary first to ascertain whether in fact the covenant touches or concerns that particular land. If on the facts it appears that the covenant does not touch or concern that particular land, the only question which remains is whether by the law in regard to annexation of a covenant to land as recognized as long ago as the year 42 Edw. III. (A.D. 1368) in the *Prior's* case (see *Spencer's* case (1)) such annexation can take place unless it can be predicated of the covenant that it touches or concerns the land to which it is sought to annex it. That is a question of dry technical law on which it would not be right, at all events for a judge of First Instance, to go beyond settled authority, or at all events beyond that which can logically be deduced from settled authority, though in the result the intention of the parties to the original covenant may be frustrated. As I have not been referred to and I cannot find any authority for the proposition that a covenant which it has been sought to annex to a particular area of land can be enforced by the person seised of that land, not being the original covenantee, in a case where it cannot truly be said that the covenant touches or concerns the land to which it was sought to annex it, I must hold that the attempted annexation has failed and that the covenant has not been effectually annexed to the land and does not run with it. The consequence is that I am bound to hold that the respondents, Childwick Bury Stud, Ltd., cannot sue the applicant on the covenant.

As it is not suggested, nor does it appear, that the covenant in question is now enforceable by any one if the respondents are not in a position to enforce it, I shall declare that the property mentioned in the title to the summons is no longer affected by any of the restrictions contained in the conveyance of June 28, 1906.

Solicitors : *McKenna & Co. ; Page, Moore & Page.*

K. R. A. H.

In re THE ANCHOR LINE (HENDERSON BROTHERS), LUXMOORE
LIMITED.

In re THE COMPANIES ACT, 1929.

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April 28.

[00278 of 1935.]

Company—Charge—Floating Charge created by English Company on its undertaking and all its assets—Company owning heritable and movable property in Scotland—Compulsory winding-up—Proceeds of sale of property in Scotland—Effect of Charge—Conflict of laws—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 270.

A shipping company, registered in England, but owning heritable and movable property in Scotland, in pursuance of a previous agreement with all its secured creditors, in March, 1934, executed a charge in Glasgow in favour of a Scottish bank, whereby, after reciting the agreement, charged with payment of sums advanced by the bank by way of floating security its undertaking and all its property and assets both present and future. By the deed the charge was to rank as a first charge on the company's undertaking and all its property and assets whatsoever and wheresoever both present and future subject to specific mortgages, and was to be a floating security, but so that the company should not have power to create any further mortgages or charges ranking in priority to or *pari passu* with the charge thereby created. This charge was registered in England. Subsequently an agreement for sale of all the company's property and assets was entered into but before it was carried into effect the company was compulsorily wound up and a liquidator was appointed.

The liquidator took out an originating summons to determine whether a valid and effectual charge had been created over the heritable and movable property and assets of the company therein specified in so far as such assets were at the commencement of the liquidation of the company locally situate in Scotland.

The bulk of the property having been sold and the proceeds of sale only left in the hands of the liquidator, the question before the Court was whether in the distribution of the assets of the company effect ought to be given to the charge executed in Glasgow in March, 1934, so far as the proceeds of sale represented heritable and movable property in Scotland at the date of the liquidation:—

Held, that (a) the charge must be construed according to English law and was a valid equitable security according to English law, and (b) s. 270 of the Companies Act, 1929, does not place heritable or other property in Scotland belonging to a

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company registered in England in a different position from property belonging to it in England or in any other part of the world. The proceeds of sale therefore of all the property of the company expressed to be subject to the floating charge (including the proceeds of sale of the heritable or movable property in Scotland) were payable to the Scottish bank in or towards satisfaction of the moneys secured by the charge of March, 1934.

British South Africa Co. v. De Beers Consolidated Mines, [1910] 1 Ch. 354 followed on the first point.

ADJOURNED SUMMONS.

The Anchor Line (Henderson Brothers), Ltd. (hereinafter called "the company"), was incorporated on July 3, 1899, under the English Companies Acts, 1862 to 1898, to acquire (inter alia) the shipping business of Henderson Brothers. The registered office was in Liverpool, England, and remained in England throughout the whole of the company's life. The head office was in Glasgow, Scotland, where a considerable part of its business was carried on. In February, 1934, the company was in financial difficulties. It had a large number of creditors and had given to some of them securities over specific items of its property. On February 9, 1934, it entered into an arrangement with the largest of its creditors,—all of whom were secured creditors. In effect the secured creditors were either to transfer or release their securities in favour of the Union Bank of Scotland, which was to grant banking facilities to the company by way of overdraft. The bank was to get the securities as security for moneys which had been or might thereafter be advanced by it, in accordance with the provisions of clause 6 of the agreement. That clause provided that the company should forthwith grant and deliver to the bank a floating charge, in terms satisfactory to the bank, creating a security by way of a first charge over the whole of the company's undertaking, property and assets, both present and future, so far as not already specifically mortgaged. By clause 13 it was provided that the agreement should remain in force until September 30, 1934, and from that date from year to year until it was determined by notice. Clause 15 provided the way in which the agreement should be determined. It also appeared from the agreement that the property of

the company included heritable as well as movable property in Scotland. LUXMOORE J.

On March 26, 1934, the company executed a charge in favour of the Union Bank of Scotland, Ltd., in purported fulfilment of clause 6 of the agreement of February 9, 1934. The charge was executed in Glasgow. It recited the agreement of February 9, 1934, and stated: "The company, as beneficial owners, in consideration and in implement pro tanto of the provisions of the said agreement, hereby charge with payment of the said sums, by way of floating security, their undertaking and all their property and assets, both present and future, which charge hereby created shall rank as a first charge on the undertaking of the company and all their property and assets whatsoever and wheresoever both present and future subject to the existing specific mortgages thereof and shall be a floating security but so that the company shall not have power to create any further mortgages or charges ranking in priority to or *pari passu* with the charge hereby created." The charge was registered on April 16, 1934, with the registrar of joint stock companies in England pursuant to s. 79 of the Companies Act, 1929.

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Negotiations for the sale of the company's business as a going concern took place, and everything was to be sold including the Scottish assets. The terms were provisionally arranged and on April 16, 1935, formal notice to terminate the agreement of February 9, 1934, was given by the bank. On April 29, 1935, meetings, which had been duly convened, were held of creditors and shareholders to consider the question of voluntary liquidation. The creditors voted in favour of voluntary liquidation; the shareholders did not pass a resolution for voluntary liquidation by the requisite majority.

On May 1, 1935, the bank presented a petition for the compulsory winding-up of the company, and the Official Receiver was appointed provisional liquidator. On May 11, 1935, the agreement for sale was approved and entered into and on May 13 an order for the compulsory winding-up of the company was made. On June 14, 1935, a Mr. A. S. Macharg was appointed the liquidator of the company.

LUXMOORE J. The liquidator took out an originating summons for the determination (inter alia) of the question whether by the charge given by the company dated March 26, 1934, a valid and effectual charge was created over certain heritable and movable property and assets of the company therein specified in so far as such assets were at the date of the commencement of the liquidation locally situate in Scotland.

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The case is reported only on the question of the effect of s. 270 of the Companies Act, 1929.

W. P. Spens K.C. and *P. J. Sykes* for the applicant. The effect of the Companies Act, 1929, s. 270, is to render property situate in Scotland in a different position from property situate elsewhere: see especially sub-s. 1 (b) and sub-s. 2. (1) The floating charge over the assets is to be as if the company had been registered in Scotland. The property therefore arising by reason of the charge should be distributed among the unsecured creditors. See *The Ballachulish Slate Quarries v. Menzies and Others*. (2)

H. Wynn Parry K.C. and *J. H. Stamp* for the respondents. As regards s. 270 of the Companies Act, 1929 (1), it is submitted that that section is merely a "collection" section. It does not deal with the distribution of assets in a liquidation; it is not a "distribution" section. For that s. 262 must be regarded; its operation is no way controlled by s. 270. It is

(1) Companies Act, 1929, s. 270, sub-s. 1: "In the winding-up of a company registered in Scotland, the following provisions shall have effect:—

(b) The winding-up shall, as at the date aforesaid, be equivalent to a decree of adjudication of the heritable estates of the company for payment of the whole debts of the company, principal and interest, accumulated at the said date, subject to such preferable heritable rights and securities as

existed at the said date and are valid and unchallengeable, and the right to point the ground hereinafter provided."

"(2.) The provisions of this section shall, so far as relates to any estate or effects of the company situate in Scotland, apply in the case of a company registered in England as it applies in the case of a company registered in Scotland."

(2) 1908 45 Sc. L. R. 667, 669.

submitted that the proceeds of sale of this heritable property in Scotland is on the same footing as property situated in England or anywhere else.

W. P. Spens K.C. in reply.

LUXMOORE J. The question which is raised by this summons is whether a charge dated March 26, 1934, under the common seal of the company, operates as a valid and effective security over certain classes of assets, which are enumerated in the summons, so far as they were at the date of the commencement of the liquidation locally situate in Scotland.

I do not think that the question arises, in the form in which it has been asked, for I understand that the bulk of the property has been sold and the proceeds of sale are in the hands of the liquidator. It seems to me that the question to be determined is whether in the distribution of the assets of the company effect ought to be given to the document dated March 26, 1934, purporting to charge by way of floating charge the whole of the company's property whatsoever and wheresoever situate, so far as the proceeds of sale represent heritable and movable property in Scotland at the date of the liquidation.

It is said that the proceeds of sale of the Scottish heritable and movable property cannot be claimed by the Union Bank of Scotland, Ltd., because the charge being only a floating charge is unenforcible in Scotland since no step was taken for the purpose of reducing into possession before the winding-up any of the property realized. In form the charge is substantially an English debenture with the usual floating charge. Such a charge is unknown to the law of Scotland. It was given by an English company and although it was executed in Scotland it must I think be construed according to English law.

When an English company possesses land abroad and purports to charge it by way of floating charge, the charge, putting it at its lowest, amounts to an agreement to charge that land, and is a valid equitable security according to

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English law. I refer to the well known passage in Lord Swinfen's judgment in the *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* (1) Lord Swinfen (then Swinfen Eady J.) said this: "An English debenture purporting to charge by way of floating security all the English company's property and assets does amount, where the English company possesses land abroad, to an agreement to charge that land, and is a valid equitable security according to English law; and the debenture-holders, upon any winding-up of that company, would rank as secured creditors in respect of the foreign land, and upon a winding-up in England they would be paid in full out of the proceeds of sale of that land, before any distribution of the proceeds of it was made among ordinary unsecured creditors. The law on this point is correctly stated by Sir Francis Palmer in the 5th edition of *Company Law* at p. 236: "Even without complying with the formalities required by the local law in relation to transfers or mortgages, it is competent to a company to create an effective charge on property belonging to it in a foreign country, for the Court, in virtue of its Chancery jurisdiction in personam, enforces equities in regard to foreign land where the mortgagor company is within the jurisdiction (*Penn v. Lord Baltimore* (2); *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan and Agency Co.* (3); and *Westlake's International Law* (1880) 183); and in determining whether there is an equity the Court regards English, not foreign law, and if according to English law there is an equity, e.g., if for valuable consideration a company agrees to give a charge on foreign property, the Court will enforce it, although the equity may be one not recognized by the *lex loci rei sitae*." (*Ex parte Pollard* (4); *Coote v. Jecks* (5); *Hicks v. Powell* (6); and *Ex parte Holthausen*. (7) ' "

This decision governs the present case, but before parting with it I must refer to an argument put forward by Mr. Spens

(1) [1910] 1 Ch. 354, 387.

(5) (1872) L. R. 13 Eq. 597.

(2) (1750) 1 Ves. Sen. 443, 444.

(6) (1869) L. R. 4 Ch. 741.

(3) [1892] 2 Ch. 303.

(7) (1874) L. R. 9 Ch. 722.

(4) (1838) Mont. & Ch. 239;

4 Deac. 27, 275, 285.

and Mr. Sykes to the effect that property situate in Scotland belonging to an English company is in a different position to property situate in any other part of the world, by reason of the provisions of s. 270 of the Companies Act, 1929. According to their argument, as I understand it, this section provides in express terms that the security and any equity arising out of it are to be ignored and the property subject to it is to be distributed among the unsecured creditors of the company.

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In my judgment, s. 270 is not directed to the distribution of assets in a liquidation. The sections which deal with that position are to be found in another part of the Act, particularly s. 262. Sect. 270, like s. 268, seems to me to be directed to the collection of assets by the liquidator. I do not think that s. 270 overrides the provisions of s. 262 or limits its operation. Reliance was placed mainly on sub-s. 1 (b) of s. 270, which provides: "The winding-up shall, as at the date aforesaid, be equivalent to a decree of adjudication of the heritable estates of the company for payment of the whole debts of the company, ..." I do not think that the reference to the payment of the whole debts of the company in that subsection is intended to be a direction as to the distribution of the proceeds of the sale of the heritable property in any manner different from that which is to be found in the other parts of the Act. The direction that the heritable estates are to be available for payment of the whole debts of the company must I think on the true construction of the section be construed as a direction for payment in accordance with the provisions of the Act, i.e., those sections which deal expressly with the distribution of assets. I cannot think that the insertion into the Act of s. 270 was the result of a deliberate intention on the part of the Legislature to place property in Scotland belonging to a company registered in England in a different position to property belonging to it in any other part of the world.

I hold that the proceeds of sale of the property of the company expressed to be subject to the floating charge, including the proceeds of sale of heritable or movable property

LUXMOORE in Scotland, are payable to the Union Bank of Scotland, Ltd.,
J. in or towards satisfaction of the moneys secured by the
1937 charge of March 26, 1934.
THE

ANCHOR
LINE Solicitors: *Collyer-Bristow & Co.; Allen, Edwards &*
(HENDERSON BROTHERS), *Oldfield.*
LD.,

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A. R. LL.-T.

In re MORLEY'S ESTATE.
HOLLENDEN *v.* MORLEY.

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J.

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April 23;
May 4.

[1920. M. 1504.]

Executors and Administrators—Pecuniary legacies—Settled legacies—Estate not realizable for period of years—Postponement of payment—Payments on account at intervals—Appropriation of payments as between principal and interest—General rule of administration.

Where owing to the nature of a testator's estate it has been impossible to realize it so as to pay legacies in full until after a lapse of some years from the date of the death, but payments on account of the principal and interest of legacies have been made at intervals under orders of the Court, the rule of administration is that each such payment must be appropriated first to interest at 4 per cent. per annum, and after satisfying all interest due, to the principal, and this rule must be applied, unless there is any direction in the will or in any order, previously made by the Court in the matter, to the contrary.

Thomas v. Montgomery (1830) 1 Russ. & My. 729; 2 Sim. 348 applied.

SUMMONS.

The testator, Howard Morley, by his will dated April 10, 1919, appointed his brother the Rt. Hon. Samuel Hope, Baron Hollenden (since deceased) and his nephews the Hon. Geoffrey Hope Morley (now Baron Hollenden) and Charles Morley executors thereof.

The testator gave 922 legacies in his will, of which 852, totalling 30,862*l.* did not exceed 500*l.* in amount. The remaining 70 legacies exceeding 500*l.* in amount, totalled 570,566*l.* The testator also bequeathed to his trustees three sums of 100,000*l.*, 25,000*l.* and 10,000*l.* respectively, which by his will were settled in favour of the children of his sister Augusta Washington and of certain nephews and nieces and their issue (hereinafter referred to as the Washington, Taylor, and Layard settled legacies).

The testator died on February 1, 1920, and his will together with two codicils not material to this case was duly proved by the executors in the Probate Registry on April 27, 1920.

The testator left a very large estate, the bulk of which, namely, over 1,202,000*l.* was capital invested in the firm of I. and R. Morley, in which he was a partner. Under the

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partnership articles this capital could only be withdrawn by equal half-yearly instalments of 10,000*l.* each year. The testator expressly authorized his trustees to allow the said capital or any part thereof to be retained in the said firm for such period and to be paid at such times and by such instalments as his trustees should think fit, provided that interest thereon at the rate of at least 5 per cent. was paid, and that payment of the entire sum was not deferred beyond fifteen years from his death.

It being impossible to make any payments in full for a considerable time, the executors in 1920 commenced this administration action, and therein applied to the Court for directions. Orders were made in 1922, 1926 and 1930 for payment of all legacies under 500*l.* in full, and for payment of certain sums on account of all larger legacies. The first payment by order on account of such legacies was at the rate of 2½ per cent. upon the legacies, such payments to be made on account of such legacies and any interest due or to become due thereon. Cheques sent on account of such legacies were accompanied by a circular letter from the executors and a form of receipt. In January, 1935, the sums which had been paid to the legatees and to the trustees of settled legacies amounted to the whole of the principal together with a small sum on account of interest.

This summons was taken out by the plaintiffs, as the surviving executors and trustees of the testator's will and codicils to have the following questions determined, namely : (1.) Whether in the events which had happened payments made to the persons entitled to legacies under the will and codicils on account of such legacies ought to be treated as having been made (a) in the first place on account of the principal of the legacies, and only when all principal had been satisfied on account of interest thereon ; or (b) in the first place in satisfaction of interest on the said legacies accrued due down to the date of each such payment, and subject thereto in satisfaction of the principal thereof ; or (c) each payment rateably on account of the principal and interest due in respect of such legacies at the date of each such payment.

(2.) If the answer to question (1.) should be in accordance with sub-head (b) or sub-head (c), whether any and if so which of the respective legatees were bound by reason of the receipts signed by them or otherwise to accept the payments made to them on account as having been made in accordance with sub-head (a) of question (1.).

The effect of the previous orders made in the action is discussed in the judgment of the learned judge.

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Geoffrey Cross for the plaintiffs.

F. R. Evershed K.C. and *D. Ll. Jenkins* for the residuary legatees, John Morley and Charles Morley. The moneys paid should be appropriated first of all in payment of capital and then of interest. But failing that solution, then each instalment when paid should be apportioned between capital and income, i.e., between principal and the interest due up to that time on so much principal.

The trustees in making the instalment payments accompanied them by notices that the moneys were paid in discharge of principal, and the legatees gave receipts for principal. That may not amount to an estoppel, but the instalments should not be treated as discharging interest first.

A legacy is not the same as a debt; it derives its effect from the will by which it is left. The trustees have power under the will to determine whether any moneys payable under the will are to be treated as being capital or income. They have so determined this question, and the legatees take their benefit subject to this right.

The practice is settled that legatees are entitled to receive interest at the rate of 4 per cent. on their legacies, as from the expiration of one year from the testator's death. Subject to this right the executors were entitled to postpone the payment for as long as they thought fit.

If the contrary view is correct, it deprives the remaindermen of any advantage they would otherwise gain from delay in realization. They are entitled to such benefit as they can derive from conserving the estate, which may increase in value. The estate must be treated as belonging to the remaindermen,

SIMONDS subject to the legacies and to interest thereon: see *In re*
 J. *Campbell* (1) and the decision of Lord Lyndhurst in *Thomas*
 1937 v. *Montgomery*. (2)

MORLEY'S There is very great difficulty in re-opening the matter when
 ESTATE, money has been paid and definitely appropriated partly to
In re. principal and partly to interest. *Thomas v. Montgomery* (2)
 HOLLENDEN v. did not apply any inflexible rule of law.
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C. R. R. Romer K.C. and *R. R. A. Walker* for other legatees in the same interest adopted these arguments.

Charles Harman K.C. and *Wilfrid Hunt* for the trustees of Mrs. Layard's settlement, and the trustees of another settled legacy. The general rule is stated in Seton on Decrees, at p. 1444, i.e., that payments on account must be made first in payment of income tax, then of interest, and then in reduction of principal. The only conclusion that can be drawn from the administration order of 1922 is that the Court decided to leave the matter open. The order then made seems to have been interpreted by Lawrence and Clauson JJ. at later dates in a particular way, treating so much as interest and so much as capital of the settled legacies.

The proper method of administration was to keep down the interest due first and then pay the capital. But here the trustees have done exactly the opposite and made payments expressed as capital without providing for the interest.

It was suggested that there should be an apportionment between principal and interest. So long as it is not known whether the legacies will be paid in full or not, the only fair course of administration is to apportion each payment between principal and interest. Otherwise the whole of any deficiency would fall upon capital. The orders made in 1930 did not determine the question now before the Court, nor the fact that the executors considered they ought to pay capital before they could pay interest.

Where there has been no determination by order of the Court, the ordinary rule of apportionment stated in Seton on Decrees and *Thomas v. Montgomery* (2) should apply, and the interest due be discharged first.

(1) [1893] 3 Ch. 468, 471. (2) 1 Russ. & My. 729; 2 Sim. 348.

L. S. Falk for legatees in the same interest adopted this argument. SIMONDS J.

Every order made in this action, with one exception, has been made in the absence of pecuniary legatees. Orders made in the absence of parties vitally interested should not be followed. 1937
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SIMONDS J. The question before the Court arises in the administration of the estate of one Howard Morley, who died on February 1, 1920, and in respect of whose estate an order for administration was made on July 12, 1920. The present question is this, and I will state it from the summons : " Whether in the events which have happened payments made to the several persons entitled to legacies under the will and codicils of the said testator on account of such legacies respectively ought to be treated as having been made : (a) In the first place on account of the principal of the said legacies and only when all principal has been satisfied on account of interest thereon ; or (b) in the first place in satisfaction of interest on the said legacies accrued due down to the date of each such payment and subject thereto in satisfaction of the principal thereof ; or (c) each payment rateably on account of the principal and interest due in respect of the said respective legacies at the date of each such payment."

The testator, as I have said, died on February 1, 1920, having made a will by which he gave a very large number of legacies. He gave in fact 922 legacies in all, of which 852 did not exceed 500*l.* in amount, but he gave certain legacies which were of a very large amount, and the question which is raised here in fact involves a very large sum of money. His estate was of such a character that it was impossible within one year after his death, or indeed within many years after his death, to pay in full the pecuniary legacies which he had bequeathed. It consisted for the great part, if not entirely, of his interest in a firm of I. and R. Morley, from which both under the terms of the articles of partnership and otherwise, as a matter of convenience, it was impossible to withdraw sums large enough to pay the legacies.

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The questions before me are really these. First, what is the rule of administration which, apart from any special direction, guides the Court in determining whether payments made on account of principal and interest are first to be ascribed to principal, or first to interest, or partly to one and partly to the other, on some and what other basis? Secondly, having ascertained the rule, is there anything either in the terms of this will or in any orders which have been made, which prevents me now from applying that rule? I take it that the rule is established beyond question by authority. It is, that where a payment is made on account of principal and interest of a legacy, it is to be ascribed first to interest and next to principal. To take the simplest possible case. Suppose that a testator dies on May 1, 1935, having by his will bequeathed a legacy of 100*l.* to A.B., to whom he does not stand as parent or in loco parentis. That legacy is payable on May 1, 1936, one year after the testator's death, and if it is not paid on that date interest at 4 per cent. begins to run, so that on May 1, 1937, there is payable to the legatee the sum of 100*l.* for his legacy, and 4*l.*, less income tax, which I ignore, in respect of interest. Supposing 54*l.* be paid to him on May 1, 1937, it is clear beyond question, that, of that 54*l.*, 4*l.* is ascribable to interest and 50*l.* is ascribable to principal. That is the rule which I must apply in this case, treating that which is paid as paid first in satisfaction of interest, and then in satisfaction of principal, unless there is something in the will or something has happened in the administration of the estate which precludes me from doing so. The authority to which I refer is *Thomas v. Montgomery*. (1) Although *Thomas v. Montgomery* (1) was not cited, the principle was referred to recently in *In re Prince* (2) and has never been questioned or doubted.

So far as the terms of the will are concerned there is nothing which prevents the ordinary rule applying. I was indeed referred to the terms of clause 32 of the will, by which the trustees were given, in common form, the power of

(1) 1 Russ. & My. 729; 2 Sim. 348.

(2) [1935] W. N. 123; 51 Times L. R. 526.

determining certain questions and, among others, whether certain payments were of capital or of income. But they do not purport to have exercised any powers under that clause, and if they had I should have had seriously to consider whether they had power to exercise them. Nothing turns, then, on the language of the will. Has anything happened in the administration of this estate which prevents the ordinary rule from applying? Here there is greater difficulty, because there has been a series of orders made which I have to consider. The first order having any bearing is an order made on March 2, 1922, where the question of payment of legacies was brought before the Court on certain proposals. I need not refer to those proposals, because the language of the order is clear and it is conceded that it does not follow the terms of the proposals precisely either in one way or in another. That order directed the applicants "as executors and trustees of the testator's will . . . to carry out the proposals contained" in a certain exhibit "for payment forthwith in full of all legacies not exceeding five hundred pounds each in value together with interest from February 1, 1921, and the legacy duty thereon and to make the annual payments to the several annuitants named in the said exhibit and further to pay forthwith to all the remaining legatees and trusts a sum calculated at the rate of $2\frac{1}{2}$ per cent. upon their respective legacies, such payments to be made generally on account of such legacies and any interest due or to become due thereon." I find nothing in the language of that order which in any way precludes me from saying that now, when matters can finally be adjusted, the ordinary rule of the Court ought not to be followed. The payments were made on account of legacies and interest, and it appears to me that they were paid in due course of administration, and the ordinary rule to which I have referred should apply.

That was the order made in 1922. After that, what happened was this: those payments being made from time to time, pursuant to that order, it became necessary in the case of certain settled legacies to determine how, as between the tenant for life and reversioner of those settled legacies,

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such payments should be treated. For the purpose of determining that question as between the tenant for life and reversioner, the question how those payments should be treated as between the residuary legatees and pecuniary legatees was not argued. At the time when those orders were made in respect of those settled legacies it could not be said with any certainty that the whole of the amount of the legacies would be paid. All that the Court was concerned to do was to see how those sums, as and when they were received, should be treated in the way that was fairest as between the tenant for life and reversioner. I cannot find, and I have been taken through the transcript of the shorthand note of the proceedings in which one of the orders was made, any trace of the point which I now have to determine being argued before the Court. Though, of course, I should follow any judgment in which the matter being determined by me had been adjudicated on, I cannot find anything in those orders which precludes me from following my own judgment in this matter.

Accordingly, I find neither in the will nor in the course of administration nor in the judgments which have been delivered for the purpose of determining the rights of tenant for life and reversioner, anything which would justify me in departing from the ordinary rule of administration which has been so long established. Therefore, I must answer the question raised in this summons by saying that the payments which have been made on account of the principal and interest in respect of the legacies are to be treated as having been made in the first place in satisfaction of interest on the said legacies accrued due down to the date of each such payment, subject to the deduction of income-tax at the rate in force for the year in which payment was made, and subject thereto in satisfaction of the principal.

Solicitors: *Biddle, Thorne, Welsford & Gait; Morten, Cutler & Co.; Pennington & Son; Robins, Hay & Waters.*

H. L. L.

In re BULMER.

C. A.

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Ex parte GREAVES.CLAUSON
and
FARWELL
JJ.

Nov. 2, 12.

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Jan. 15.

Bankruptcy—Committee of Inspection—Limited company—Appointment as member—Appointment of proxy to represent company on committee—Fiduciary position—Purchase by representative of company from bank of shares held as security for money owing from debtor—Ignorance of purchaser of identity of owner of equity of redemption with debtor—Validity of transaction as against trustee in bankruptcy—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 20—Bankruptcy Rules, 1915, rr. 347, 348.

At the date of the receiving order the bankrupt had on deposit with a bank certain preference and ordinary shares which had been deposited by him by way of security for a loan. A creditor for a large sum of money, a limited company, was appointed one of the members of the committee of inspection in the bankruptcy. The company, being unable to act personally, appointed the appellant, who was its chairman, to act as its general proxy on the committee. In the course of the bankruptcy the appellant, whilst so acting, purchased some of the deposited shares from the bank without any knowledge that the person who had deposited the shares was the bankrupt and that the equity of redemption in them formed part of his estate. The appellant subsequently sold some of these shares:—

Held (affirming the decision of the Divisional Court), that the appellant must in the circumstances of the case be treated as a member of the committee of inspection and was therefore in a fiduciary relation to the bankrupt's estate. He was therefore precluded on general equitable principles from entering into the present transaction, which was therefore void against the trustee in bankruptcy. As however the transaction was entered into by the appellant in ignorance that the shares formed part of the bankrupt's estate, the Court, whilst ordering him to hand over to the trustee in bankruptcy the shares retained by him (subject to his lien for the price paid by him), would not order him to replace the shares sold by him but would be content to require him to account for the purchase money actually received for the shares which he had resold.

The validity of the appointment of a limited company as a member of a committee of inspection doubted.

APPEAL from a decision of His Honour Judge McCleary sitting in the Bradford County Court.

This case came before the Divisional Court (Clauson and Farwell JJ.) sitting in Bankruptcy on an appeal from an order

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of the county court at Bradford made on the motion of the Commissioners of Inland Revenue in the bankruptcy of Sir James William Bulmer, a bankruptcy which dated from 1932.

The facts as stated by Clauson J., who delivered the judgment of the Divisional Court, were as follows: The Commissioners of Inland Revenue were admittedly creditors in the bankruptcy. At the date of the receiving order the bankrupt was entitled to 16,750 preference shares of 10s. each and 521,144 ordinary shares of 1s. each, all fully paid up, in the capital of a public company, Smith, Bulmer & Co. The shares, together with certain policies of assurance belonging to the bankrupt, were all pledged to the National Provincial Bank as security for a sum of about 56,000*l.* and stood at the commencement of the bankruptcy in the name of Branch Nominees, Ltd., as nominees of the National Provincial Bank. In due course the bank realized about 8000*l.* on the policies. In January, 1934, the bank sold 12,500 of the preference shares together with 150,000 of the ordinary shares to Alfred Greaves, the present appellant. The appellant afterwards resold part of the shares. By the motion upon which the county court judge made the order under appeal, it was sought to recover from the appellant for the benefit of the bankrupt's estate (a) such of the shares as the appellant still retained, (b) the proceeds of sale of such shares as the appellant had sold, on the terms of repaying to the appellant the price he paid to the bank for the shares which he bought from them. The county court judge found this claim to be established and made an order under which the appellant was to transfer to the trustees in the bankruptcy the shares which he still retained, and had to account for the proceeds of the shares sold, receiving back the price which he paid to the bank. No question arose either on the figures or on the exact terms of the county court judge's order.

The question before the Divisional Court was whether the county court judge was right in holding that the sale by the bank to the appellant was, as between the trustee and the appellant, a sale in respect of which the appellant must,

on equitable principles, surrender for the benefit of the bankrupt's estate any advantage he has obtained.

The bank were not before the Court, and it was not suggested that the efficacy of the sale could be questioned as between the bank and the appellant.

Early in the history of the bankruptcy a committee of inspection was appointed. The company, Smith, Bulmer & Co., whose shares were in question, was a very large creditor of the bankrupt, and was ostensibly appointed a member of the committee, and had throughout acted as such through the appellant, who was chairman of the board of the company, and who held the company's general proxy.

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W. N. Stable K.C. and *Tindale Davis* for the appellant.

Sir Gerald Hurst K.C. and *Gerald Upjohn* for the Commissioners of Inland Revenue.

Cur. adv. vult.

1936. Nov. 12. The judgment of the Divisional Court (CLAUSON and FARWELL J.J.) was delivered by CLAUSON J. [who, after stating the facts as above set out, continued:] It is unnecessary for the purposes of this case to consider whether on the true construction of the Bankruptcy Act, 1914, a limited company can be properly appointed a member of a committee of inspection; the company accepted the office and acted in regard thereto through the appellant. It was somewhat faintly suggested, both before the county court judge and in this Court, that, in those circumstances, the appellant was not under the duties and obligations which by law attached to membership of the committee of inspection; but the county court judge, in our view quite properly, dealt with the matter on the footing that in the circumstances the appellant was under those duties and obligations. The appellant placed himself quite deliberately in the position of a member of the committee, and it is too late for him now to claim to be absolved from the duties and obligations attaching to that position.

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That the members of a committee of inspection are in a fiduciary position in relation to the bankrupt's estate and to those interested in the estate was emphatically stated by Lord Cozens-Hardy M.R. some twenty-two years ago in *In re Geiger* (1), and must now be taken to be well settled, and it is scarcely necessary to refer in support of the proposition to s. 20 of the Bankruptcy Act of 1914 and to the rules, 347 and 348, which develop in plain terms the consequences flowing from membership of the committee of inspection. The fiduciary position which the appellant must thus be taken to have occupied at the time when he purchased the shares in question from the bank, shares which (subject only to the bank's rights as chargees) formed part of the bankrupt's estate, must, as it appears to us, necessarily result in this, that, unless there is full disclosure to all concerned, or possibly the Court's leave obtained on proper disclosure under some statutory provision, the appellant is precluded from entering into a transaction (such as the purchase now in question) in which he has a personal interest conflicting or capable of conflicting with the interest of those (in this case the persons interested in the bankrupt's estate) whom he is bound by fiduciary duty to protect: see *Aberdeen Ry. Co. v. Blaikie*. (2) That in the matter of the purchase the appellant's personal interest conflicted with the interest of the bankrupt's estate is obvious. The purchase put an end to the equity of redemption in the shares so purchased. It was the purchaser's interest to get the shares as cheaply as possible. It was to the interest of the estate that the best possible price should be secured towards diminution of the bank's claim against the estate.

There is one point made by the appellant on which comment is necessary. It was said that the purchase was in fact made, and was found by the county court judge to have been made, in innocence, and without the appellant appreciating either, first, that there was any reason why he was not as free to buy as any ordinary purchaser, or secondly, that in fact the shares were shares which (subject to the bank's rights) belonged to the estate. His failure (which we are quite

(1) [1915] 1 K. B. 439.

(2) (1854) 1 Macq. 461.

prepared to accept as established) to appreciate the peculiar position in which he stood in regard to the matter, while it absolves him from any suspicion of moral obliquity is, as it appears to us, irrelevant. A person whom the Court finds to be in a fiduciary position must suffer the disabilities of that position whether he does or does not know the consequences of his position in the eye of the law. But the question whether he in fact knew that the purchased shares formed part of the estate is not necessarily immaterial. If he knew the fact the Court would, in our judgment (though it is not necessary for the purposes of the present case so to decide), treat him as a trustee of the shares as from the date of purchase, and (subject only to his lien for the price paid) would call upon him to hand over any shares which he had not realized and to replace any shares which he had realized. If he did not know that the shares formed part of the estate, the Court, while requiring him (subject to his lien for the price paid) to hand over shares retained, would not call upon him to replace the shares realized while he was in this state of ignorance: it would be content to require him to account for the purchase-money actually received for the shares which he resold. His ignorance would absolve him from blame for reselling the shares, and would protect him from the full measure of relief which the Court would have exacted had he throughout known the facts. But as soon as the facts are drawn to his attention it is against conscience for him to retain the benefits which he has acquired by an act which, on ascertaining the facts, he must be taken to know to be unconscientious, and the Court purges his conscience by taking from him the profits actually made.

In the present case such relief only is claimed against the appellant as the trustee in bankruptcy is entitled to if the appellant at the time of purchase did not know that the shares formed part of the estate; and it is not necessary to examine whether the appellant in fact so knew. The county court judge seems to have found that the state of the appellant's knowledge at the time of the purchase was such that if he had given his mind seriously to the matter he would have

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C. A. appreciated that the shares did in fact form part of the estate :
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BULMER, and the judge seems to have drawn the conclusion that the
In re. appellant's duty towards the estate was in the circumstances
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Ex parte. unnecessary for this Court to reach a conclusion on either
of these points, since the appellant undoubtedly knows the
facts now, and therefore cannot conscientiously retain the
advantages which he has obtained by the purchase and by
reason of the county court judge's order must surrender.

In our judgment the order against which this appeal is brought was correct and the appeal must be dismissed with costs. The appellant may have leave to appeal if he so desires.

P. J. B.

C. A. The appellant Greaves appealed. The appeal was heard on January 15, 1937.

On the opening of the appeal the Court directed that the trustee in the bankruptcy should be joined as a respondent on the appeal with the Commissioners of Inland Revenue.

R. F. Roxburgh K.C. and *P. B. Morle* for the appellant. The respondents have to show that the appellant when he purchased the shares in question was in some fiduciary relation to the bankrupt's estate, and this they have failed to do. In the first place, he was never in fact appointed a member of the committee of inspection. He was merely appointed the general proxy of his company, which, as being a large creditor of the bankrupt, had been appointed a member of the committee of inspection and as such proxy represented the company at the meetings of the committee. He did not purport to act thereon on his own behalf. It cannot, it is submitted, be said that in so acting a fiduciary relationship was created between him and the bankrupt's estate.

Further, at the time he purchased the shares he was wholly unaware that the equity of redemption in them formed part of the bankrupt's estate. He never was so told by the trustee in bankruptcy, nor did he ever see the bank's proof of debt,

nor was the question of the shares ever raised at any meeting of the committee at which he was present.

Assuming, however, that the Court is of opinion that the appellant ought to be treated as a member of the committee of inspection, then it is submitted that there is no provision in the Bankruptcy Act, 1914, which constitutes a member of a committee of inspection a trustee for the creditors of the bankrupt. The committee of inspection is the creation of s. 20 of the Act, and the Court will not impose duties and liabilities on members beyond those which are imposed on them by rules 347 and 348. Where a person accepts the office of a member of a committee of inspection he does so on the implied undertaking that he will be subject only to such liabilities as are imposed on him by the bankruptcy rules, and those rules do not provide for the present case.

[They referred to *In re Geiger* (1) and *Aberdeen Ry. Co. v. Blaikie*. (2)]

Sir Gerald Hurst K.C., *J. H. Stamp* and *Gerald Upjohn* for the respondents, the Commissioners of Inland Revenue and the trustee in bankruptcy, were not called upon to argue.

LORD WRIGHT M.R. This is an appeal from a Divisional Court consisting of Clauson J. and Farwell J., sitting in Bankruptcy, who confirmed the judgment of His Honour Judge McCleary in the county court at Bradford, sitting in Bankruptcy. There was at one time a question whether the proper parties were before the Court, because the motion was originally drawn in the name of the Commissioners of Inland Revenue, who are very large creditors of the debtor's estate, and it does not seem that the motion could have been properly dealt with unless the trustee in bankruptcy had also been before the Court. But I need not stop to discuss the exact position in that respect, because the trustee has now been added, and in my opinion beyond any doubt he is the proper person to take these proceedings as representing the estate and the general body of the creditors.

The debtor owed a considerable sum of money to the

(1) [1915] 1 K. B. 439.

(2) 1 Macq. 461.

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National Provincial Bank. He also owed money to other creditors, and in particular something like 80,000*l.* or 90,000*l.* arrears of tax to the Commissioners of Inland Revenue. What the Court is concerned with in this motion is a certain block of preference and ordinary shares in a company called Smith, Bulmer & Co., Ltd. They were substantial creditors, and, as such, they with two others were appointed in due course of the bankruptcy as members of the committee of inspection under s. 20 of the Bankruptcy Act, 1914. A Mr. Swallow was appointed trustee in March, 1932, and two other persons, Mr. Flather and Mr. Williams, were also appointed members of the committee.

I am not going to consider whether it is possible to appoint a limited company as a member of a committee of inspection under s. 20 of the Bankruptcy Act. I have grave doubt whether any such appointment is valid; but as I shall explain a little later, it is not necessary to decide that point. The company itself could not, of course, act on the committee of inspection. It appointed Mr. Greaves, the respondent on the motion, as its proxy, as its general agent to represent it on the committee. Mr. Greaves was chairman of Smith, Bulmer & Co., Ltd. He, in the course of the bankruptcy, purchased on his own account, and paid for on his own account, a certain number of preference shares and ordinary shares in the company. He bought them from the bank, who held them as part security for the debt which the debtor owed to them. When I say they were held by the bank as security, they were held according to the ordinary course of business by nominees called Branch Nominees, Ltd., but for all practical purposes they were bought from the bank.

As between the bank and Mr. Greaves no question arises and I say nothing more about that. As to the knowledge which Mr. Greaves may or may not have possessed on the question of who owned these particular shares, or rather who owned the equity of redemption of these shares, that is a matter on which no decision need be arrived at, because, as will appear later, the decision appealed from is based on the view that at the date of the purchase Mr. Greaves was perfectly

innocent. It is quite clear that if he had exercised his mind on the question, he must have realized that these shares in all human probability were shares the mortgagor of which was the debtor; but as the evidence stands, he did not exercise his mind upon it and therefore the matter must be dealt with on the footing that he was perfectly innocent of knowledge in that respect at the time of the purchase.

In these circumstances the law has to be considered, and two main questions have been debated. One is whether Mr. Greaves, by acting as he did, as general proxy to Smith, Bulmer & Co., Ltd., at the various meetings of the committee of inspection, is on the same footing as if he had himself been a member of the committee, and secondly, if he is to be treated as being in that position, what are his liabilities in respect of the purchase which he has effected of those shares the equity of redemption in which formed part of the insolvent estate?

On the first question it appears that there was very little argument before the Divisional Court. The judgment of the Divisional Court says: "It was somewhat faintly suggested, both before the county court judge and in this Court, that, in those circumstances, the appellant was not under the duties and obligations which by law attached to membership of the committee of inspection; but the county court judge, in our view quite properly, dealt with the matter on the footing that in the circumstances the appellant was under those duties and obligations. The appellant placed himself quite deliberately in the position of a member of the committee, and it is too late for him now to claim to be absolved from the duties and obligations attaching to that position." I entirely agree with that view and, indeed, I do not think it necessary to add anything further to it.

Treating the appellant, therefore, as being under the same duties and obligations as if he were a member of the committee of inspection, it is necessary now to consider what those duties and obligations were.

Under s. 20 of the Bankruptcy Act, 1914, provision is made for the creditors qualified to vote at their first or any

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subsequent meeting by resolution to appoint a committee of inspection for the purpose of superintending the administration of the bankrupt's property by the trustee. That means that the committee are appointed for the purpose of carrying out, or rather assisting the trustees in carrying out, the administration and the realization of the insolvent's property, and they are therefore in the position of trustees for sale. Now taking that definition of their functions and their duties, it would appear on general equitable principles that they would be, like any other trustees in that position, debarred from buying or trafficking in the trust property, and therefore they would come within the general rule which is stated in Lewin on Trusts, 13th ed., at p. 1108. The learned author there says, what is perhaps a commonplace: "The rule is now universal, that, however fair the transaction, the cestui que trust is at liberty to set aside the sale and take back the property"—that is to say, where there is the purchase by a trustee of any part of the trust property. "If a trustee were permitted to buy in an honest case, he might buy in a case having that appearance but which, from the infirmity of human testimony, might be grossly otherwise." That is the general rule, and, treating Mr. Greaves as occupying that position, it would seem to follow almost as a matter of course on general principles that the trust property, the property belonging to the insolvent estate, was an area denied to him for purposes of trafficking or purchasing, and completely denied to him. That is the view which has been taken by the county court judge and by the judges of the Divisional Court in this case, and I do not gather, subject to an argument with which I shall deal in a moment—no doubt an argument which has to be carefully considered—that the proposition is seriously disputed, as a general proposition of equity, by Mr. Roxburgh.

There does not seem to be any very precise authority on the question of the exact position of members of the committee of inspection, but reference has been made to *In re Geiger*. (1) That case did not raise the question in a form exactly the same as it now has to be considered, but Lord Cozens-

(1) [1915] 1 K. B. 439.

Hardy M.R. there said (1): "The statute is full of provisions recognizing the fiduciary position of members of a committee of inspection and imposing restrictions upon their powers, none of which would apply to a sole creditor." I emphasize the word "recognizing" because obviously Lord Cozens-Hardy did not treat the conclusion as depending on any express statement in the statute that the members of the committee of inspection were in a fiduciary position. It seems to me to follow *ex necessitate* from the description of their functions which I have just read, and on that basis the Divisional Court has made the order which it has, and with which I shall deal in a moment.

What has been argued very strenuously by Mr. Roxburgh is this. He says the committee of inspection is the creation of statute and you have to look at the statute, or rather, to the statutory rules made to give effect to the statute, to see exactly what is the ambit of their duties and liabilities, and that beyond the express definition and limitation of those duties and liabilities the Court will not go. There is no room for the application of those general equitable principles which otherwise would normally be applied by the Court to persons in the fiduciary position charged with such duties as the statute by s. 20 imposes on them. With the greatest respect to his argument, I cannot give effect to it. Rules 347 and 348 of the Bankruptcy Rules, 1915, do indeed contain specific provisions as to certain consequences which may follow from any breach of the particular matters forbidden by those rules. Rule 347 provides: "Neither the trustee nor any member of the committee of inspection of an estate shall, while acting as trustee or member of such committee, except by leave of the Court, either directly or indirectly, by himself or any partner, clerk, agent or servant, become purchaser of any part of the estate. Any such purchase made contrary to the provisions of this rule may be set aside by the Court on the application of the Board of Trade or any creditor." That rule obviously is limited to a trustee or a member of the committee. It is limited to the particular

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case of purchasing any part of the estate, and it gives a particular potential remedy to be exercised by the Court. But I see no reason at all to treat it as intended to be exhaustive, nor do I think that even the remedy which is stated in the final words is intended to be exhaustive even in the cases referred to expressly in the rule. Equally in r. 348, sub-r. 2 : “ No member of a committee of inspection of an estate shall, except under and with the sanction of the Court, directly or indirectly, by himself or any employer, partner, clerk, agent or servant, be entitled to derive any profit from any transaction arising out of the bankruptcy, or to receive out of the estate any payment for services. . . . If it appears to the Board of Trade that any profit or payment has been made contrary to the provisions of this rule they may disallow such payment or recover such profit, as the case may be, on the audit of the trustee’s account.” There again it is impossible, I think, to treat that remedy as being intended to be exhaustive ; it is merely giving a convenient administrative method of dealing with the particular problem which the rule concerns. These rules are made merely to give effect to the general provisions of the Act. They do not cut down the general provisions of the Act. They are not intended to be exhaustive. All that is said is that they are not to extend the jurisdiction of the Court. I refer to s. 132 of the Bankruptcy Act, 1914, which contains the rule-making power. Those rules do, however, recognize that the members of the committee of inspection are in a fiduciary position, and to that extent they support the case which is made on behalf of the bankrupt’s estate.

It is scarcely necessary to say that it follows from that view that the appellant has been properly held liable in the way in which the Court has held him to be liable to account. The decision of the Divisional Court and of the county court, as I have said, proceeds on the footing that Mr. Greaves had not a specific knowledge present to his mind as to the ownership of the shares, and that has, in the present case, only this consequence, that it affects the extent of the order which the Court ought to make and which the Court has

made in this case. The matter is very clearly dealt with in the judgment of the Divisional Court in this passage: "If he"—that is, Mr. Greaves—"did not know that the shares formed part of the estate, the Court, while requiring him (subject to his lien for the price paid) to hand over shares retained, would not call upon him to replace the shares realized while he was in this state of ignorance"—that would be the appropriate remedy if he knew at the time that the property was the property of the estate. He would then be compelled to restore it or to pay adequate compensation if he failed to restore it. "It would be content to require him to account for the purchase-money actually received for the shares which he resold. His ignorance would absolve him from blame for reselling the shares, and would protect him from the full measure of relief which the Court would have exacted had he throughout known the facts. But as soon as the facts are drawn to his attention it is against conscience for him to retain the benefit which he has acquired by an act which, on ascertaining the facts, he must be taken to know to be unconscientious, and the Court purges his conscience by taking from him the profits actually made."

I agree completely with that statement of the position, and I think the appeal ought to be dismissed. I will only add, in respect of one argument which has been addressed to the Court, that this conclusion puts no unfair burden on a person in Mr. Greaves's position of a member of the committee of inspection. All he has to do in a case of this sort is to make full disclosure, or, if necessary, ask the sanction of the Court. He must make full disclosure if he knows of the circumstances, because otherwise he is failing in his duty to act independently and conscientiously in the fair realization of the estate. Of course if he does not know, then the only burden which falls upon him afterwards is that he is compelled by law to give back the advantages which he had no right to acquire and therefore had no right to retain so soon as his conscience is affected by knowledge of the facts. The appeal will be dismissed.

ROMER L.J. I entirely agree, and I only want to add this.

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C. A. Mr. Roxburgh at the conclusion of his argument submitted that even though Mr. Greaves occupied a fiduciary position in this matter, nevertheless the trustee in bankruptcy was not a person who could recover from him any profit that he might have obtained out of the transaction which we have been investigating, nor could any individual creditor. That no individual creditor could obtain an order for the refunding of any profit may be conceded; at any rate I express no opinion about it. But if any such profit has been made, as it has in this case, then that profit belongs to the estate of the bankrupt divisible among his creditors. Consequently the right person to recover that profit, if made, is the trustee in bankruptcy.

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GREENE L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for Greaves & Greaves, Bradford.*

Solicitors for respondents: *Helliwell & Co., for John R. Farrar, Halifax.*

W. I. C.

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[1936. B. 3714.]

April 29, 30;
May 4, 11.

International law—Invasion—Occupation—Flight of monarch—Annexation proclamation—De facto government by occupying power—Decree dissolving bank—Appointment of liquidator—Legal proceedings on behalf of bank unauthorized by liquidator—Validity of acts of de facto government.

By a decree dated June 20, 1936, the Italian government purported to dissolve the Bank of Ethiopia. The Emperor Haile Selassie had left Abyssinia on May 1 or 2, 1936. In an action begun on September 29, 1936, the Bank of Ethiopia made claims against the National Bank of Egypt (its correspondent in Cairo and London), and against the liquidator appointed pursuant to the Italian decree. In the action direction was made for the trial of the issue whether the Bank of Ethiopia had been dissolved or had otherwise ceased to exist by virtue of the laws of the country under the laws whereof it was incorporated, or, if it had not so ceased to exist, whether the action had been brought with its authority. On April 28, 1937, the Emperor Haile Selassie, in England, signed a decree purporting to empower all companies incorporated under Ethiopian law to hold valid meetings of their members and of their councils of administration and to carry on business outside Abyssinia. On April 29, 1937, the issue came before the Court for trial. During the hearing there was put before the Court a certificate from the Foreign Office showing that the British government, in December, 1936, recognized the Italian government as being in fact (*de facto*) the government of the area of Abyssinia then under Italian control:—

Held, (1.) that the decree of June 20, 1936, was made by a *de facto* government having the occupied territory completely under its control and therefore under its full governmental authority.

(2.) that the action could not be held to have been authorized by the Bank of Ethiopia, as it had not been brought by the liquidator's authority.

Semble, a *de facto* government has necessarily full responsibility, and its acts have the status of acts of a government with full responsibility.

Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K. B. 532, and *White, Child & Beney, Ltd. v. Eagle, Star, & British Dominions Insurance Co., Ltd.* (1922) 127 L. T. 571 followed.

ISSUE IN AN ACTION.

This was an issue which was directed to be tried in an

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action by the Bank of Ethiopia against the National Bank of Egypt. The issue was whether the Bank of Ethiopia had been dissolved or had otherwise ceased to exist under or by virtue of the laws of the country under which it was incorporated or, if it had not so ceased to exist, whether it had authorized the action to be brought.

In April, 1935, the governor of the Bank of Ethiopia (which had been formed in 1931 as a company under Ethiopian law) went on leave from Abyssinia to Europe, acting there for the bank and for the Ethiopian government with regard to providing personnel and stores in case of war with Italy. The bank's fortunes in Abyssinia were left to the care of Mr. Ernest Wright, subject to the governor's instructions.

War with Italy came late in 1935. The Emperor Haile Selassie left Abyssinia on May 1 or 2, 1936, and from May 6, the activities of Mr. Wright and his staff came under Italian control. Three days later annexation of Abyssinia was proclaimed by the Italian government, and Marshal Badoglio was appointed Governor-General and Viceroy: and on June 20 the decree was made purporting to dissolve the Bank of Ethiopia.

On September 29, 1936, this action was started in the name of the Bank of Ethiopia under the authority of persons who had been directors before June 20, and who were not, at the date of the action, acting either under the direction or with the approval of the liquidator. The action claimed, substantially, a settlement of outstanding accounts between the Bank of Ethiopia and the National Bank of Egypt. It was not disputed that the accounts would have to be adjusted between the proper parties, and the question arose whether the liquidator appointed pursuant to the Italian decree was the proper person to adjust them with the National Bank of Egypt. The issue was therefore settled and on April 29, 1937, came before the Court for trial. On April 28, 1937, the Emperor Haile Selassie, in England, signed a decree by which he purported to empower all companies incorporated under Ethiopian law to hold valid meetings and to carry on business outside Abyssinia.

A certificate from the Foreign Office put before the Court during the hearing, stated that in December, 1936, the British government recognized the Italian government as being in fact (de facto) the government of the area of Abyssinia then under Italian control.

Evidence as to Italian law was given by Dr. Francesco di Genaro, of the Procurator's Office, Rome.

The facts are fully stated in his Lordship's judgment.

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Wynn Parry K.C. and *V. R. Idelson* for the National Bank of Egypt as plaintiff in the issue. On the point now before the Court, it is immaterial whether it is as the de facto or de jure government of Abyssinia that His Majesty's government have recognized the Italian administration. Even if it is only as the de facto government, there is proof that the decree purporting to dissolve the Bank of Ethiopia was made: therefore other governments cannot question its validity. That decree is valid according to the Italian Commercial Code, and is unchallengeable, as also is the authority of the Italian liquidator. Therefore the Bank of Ethiopia, viewed as a company incorporated under Ethiopian law, is now non-existent: *Macaulay v. Guaranty Trust Company of New York*. (1) It follows that its directors, or those who were its directors, have no power to pass the resolution by virtue of which alone this action could have been brought. *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (2)

Sir William Jowitt K.C. and *Andrew Clark* for the Bank of Ethiopia as defendant in the issue. The Court cannot hold that the Bank of Ethiopia has ceased to exist as a company incorporated under Ethiopian law unless it can find, on the evidence, that the law of Italy is now the law of Abyssinia. It is a clear rule of international law that an occupying power, in promulgating decrees, may go no further than the safety and security of its occupying army necessitate. It must not interfere with local law or supersede local courts. The test to be applied, therefore, is not what is the view of

(1) [1927] W. N. 308.

(2) [1921] 3 K. B. 532.

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Italian law, but what Abyssinian courts would have said, if they had not been superseded, as to the present position of the Bank of Ethiopia: Oppenheim, *International Law*, 5th ed., vol. ii., p. 349, para. 169; Phillimore, *International Law*, 3rd ed., vol. iii., p. 844, D. LXXCI; p. 869, D. XCII.

Further, the annexation proclamation purported to include the whole of Abyssinia. In fact, at the date of that proclamation, much of Abyssinia was unoccupied by the Italian forces. The decree purporting to dissolve the Bank of Ethiopia went much further than international law allows. It was an act of needless interference with Abyssinia, a power friendly to the British government, and was not necessary for the safety of the Italian forces. Therefore, the Court will not recognize it. It thus follows that the present action could be, and has been, properly instituted in the name of the Bank of Ethiopia: *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1) and *White, Child & Beney, Ltd. v. Eagle, Star, & British Dominions Insurance Co., Ltd.* (2)

Lionel L. Cohen K.C., J. Forster and Rafael Valls for the liquidator as a defendant in the issue. The Italian forces, at the date of the decree dissolving the Bank of Ethiopia, were in occupation of practically the whole of Abyssinia. The decree was, therefore, necessary in the interests of those forces, and the liquidation had to take place.

C. M. Picciotto held a watching brief for Mr. Ernest Wright and *V. R. Idelson* for the National Bank of India.

Cur. adv. vult.

1937. May 11. CLAUSON J. Previously to the year 1931, an Egyptian company, the Bank of Abyssinia, conducted the business of banking at Addis Ababa, the capital city of Ethiopia, under a government concession. This arrangement was brought to an end in the year 1931, when a company, the Bank of Ethiopia, was formed under the law of Ethiopia. Its constitution provided for a board of management of ten persons, six to be appointed by the government of Ethiopia

(1) [1921] 3 K. B. 532.

(2) 127 L. T. 571.

(who held six-tenths of the capital), and four by the holders of the remaining capital. An important function of the company was to be a bank of issue, and it appears in fact to have acted in close contact with the Minister of Finance for the time being. As I understand it, there was no other bank in the Ethiopian Empire. The bank had branches in various parts of the country, and a forwarding agency in Djibouti, within French territory. Mr. Collier, who gave evidence before me, became governor of the bank upon its formation, and appears to have been in fact in control of its operations. Oddly enough, the constitution of the bank, while providing for the office of governor, does not define his powers or his duties, but appears to vest control entirely in the board of management, who, as I read the material documents, are to meet at the "siège social" of the company, that is at Addis Ababa, and are to function with a quorum of five. There is a provision that a member of the board who absents himself for six months from the meetings is to cease to hold office.

In April, 1935, Mr. Collier left Addis Ababa on six months' leave of absence for Europe, where he seems to have been acting on behalf of the bank and (as it would appear) of the government with regard to the provision of war-like personnel and stores in anticipation apparently of a threatened outbreak of hostilities between the Ethiopian government and Italy. The affairs of the Bank in Ethiopia were left under the control of Mr. Wright, who later, in February, 1936, was formally constituted a member of the board. In the autumn of 1935 hostilities in fact began. Mr. Collier did not return to Ethiopia, but continued his activities in Europe, further leave of absence being granted to him. If regard is to be paid to the letter of the bank's constitution, there would seem to be good ground for saying that Mr. Collier ceased, towards the latter part of 1935, to be a director, and it may be (though this is obscure) that he no longer had general authority as governor or otherwise to act on behalf of the bank. However, in fact, no question seems to have been raised, and, though absent from Addis Ababa, Mr. Collier continued to represent the bank in Europe, and, so far as

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communications remained open between him in Europe and Mr. Wright in Addis Ababa, to exercise general control, through Mr. Wright, over the activities of the bank. Subject to a general adherence to Mr. Collier's instructions, Mr. Wright seems to have been in control at Addis Ababa. It would seem that until the events of May, 1936, about to be related, board meetings were held periodically at Addis Ababa, and anything Mr. Wright did seems to have been done with either the authorization or the acquiescence of such meetings.

In due course the fortunes of war turned against the Ethiopian government. At the end of April, 1936, the Italian Army approached the capital. On the night of May 1, or early on May 2, 1936, the Emperor left the capital and the country. There was an interval in which the capital appears to have been given over in great measure to looting and rioting. On May 5, the Italian army entered the capital, and from and after May 6, the affairs of the bank in the capital were conducted by Mr. Wright and his staff, under the supervision of the representative of the Italian authorities. The country branches of the bank had been gradually closed down as the Italian army obtained control of the areas in which they were situated, the last being closed on or about May 8. There was, however, an agency at Gore in the remote west of the country in a part where the Italian forces did not obtain effective control until August or September, 1936, and the staff there seems to have kept the agency open in some sense or other until about August or September.

On May 9, 1936, the Italian government issued an annexation proclamation. Marshal Badoglio on May 9, 1936, was appointed Governor-General and Viceroy as representing the King of Italy, and from that date it appears as a fact from the evidence before me that the Italian government, through its officers, exercised effective governmental control over Addis Ababa, the "siège social" of the bank, and over a gradually increasing tract of Ethiopian territory. In the middle of December, at which date the territory under Italian control seems to have covered the whole of the portion of Ethiopian territory in which any activities of the bank had

ever been carried on, His Majesty's government, as I am authoritatively informed by a communication from one of His Majesty's Principal Secretaries of State, recognized the Italian government as being in fact (de facto) the government of the area then under Italian control.

The effect of that communication is that I am bound to treat the acts of the government which was so recognized as acts which cannot be impugned on the ground that it was not the rightful but a usurping government. That follows from the decision of the Court of Appeal in the case of *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1), and my last observation applies not only to acts done after the date when His Majesty's government recognized the Italian government as the de facto government, but also to any acts of that government done at any time at which, on the facts proved before me, they were in fact the government, though not yet recognized as such by His Majesty. For this proposition it is sufficient for me to refer to the decision of the Court of Appeal in *White, Child & Beney, Ltd. v. Eagle, Star, & British Dominions Insurance Co., Ltd.* (2)

I have had before me a very experienced Italian lawyer who has given me quite clear evidence as to the law as administered by the de facto government in Ethiopia, and has referred to authenticated copies of various decrees made under that governmental authority. In view of this evidence I find the facts to be as follows: The Italian troops having, as I mentioned above, entered the capital on May 5, 1936, the government control of an area which included the whole of those portions of Ethiopia in which the Bank of Ethiopia was carrying or ever had carried on business (save so far as the agency at Gore was concerned which I have mentioned above) was on May 9 effectively assumed by Marshal Badoglio on behalf of the Italian government, and on or about June 1, a regular governmental administration was set up which was expressed to cover the whole of Ethiopia, and did effectively cover at least the area in which the bank operated or (with the trifling exception already mentioned) had ever operated.

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From May 5 onwards, the operations of the bank were controlled by the Italian government authorities. Early in June, Mr. Wright was directed to suspend business, save for the purpose of getting in credits. On June 20, a government decree, valid according to the law as recognized and administered by the de facto government, placed the bank in liquidation and appointed one Castagnaro, its liquidator. The effect of that decree according to the law as recognized and administered by the de facto government, and accordingly prevailing at that time in the area of Ethiopia controlled by the Italian government, was to dissolve the bank, save in so far as it might be necessary to keep it on foot for the purposes of liquidation. Further, this governmental act had, according to law administered by the de facto government, the effect of putting an end to the authority of any person other than the liquidator, or those acting under his authority, to represent, act for or bind the company. I am satisfied on the evidence that if to-day the courts of the de facto government at Addis Ababa had before them the question which I have to consider, namely, whether the bank of Ethiopia has been dissolved, and has accordingly ceased to exist, except in so far as may be necessary for the liquidation of its affairs, and whether any one, acting otherwise than under the authority of the liquidator of the bank, appointed as I have mentioned, can conduct litigation on behalf of the bank, the answers given would unquestionably be in the affirmative to the first question, and in the negative to the second question.

The original liquidator Signor Castagnaro has been replaced by a Signor Liguori, but it is not suggested that that circumstance makes any difference apart from the change in the person of the liquidator.

A good deal of discussion took place before me as to the validity of certain meetings of shareholders, and of directors, which were subsequently convened. The shareholders' meetings took place in Addis Ababa, and it may well be that they were irregular as tested by the provisions of the bank statutes. Various meetings of directors were convened by Mr. Collier in Europe, and it may well be (and indeed I think it was)

the case that, tested by the provisions of the bank statutes, they were entirely irregular and ineffective for any purpose. At the last moment there was produced in Court a decree signed by the fugitive Emperor of Abyssinia at Bath in this country, which, it was suggested, had the effect of altering or modifying the legal position in regard to the regularity or effectiveness of those meetings of directors. I cannot imagine any ground upon which it could be seriously argued that I could pay any attention to this decree. I do not propose, however, to go into any of those matters, because it appears to me that, if the decree which placed the bank in liquidation has the effect which I have indicated, they become irrelevant.

I must, however, deal with the grounds upon which it was suggested by counsel for the Bank of Ethiopia that the liquidation decree was ineffective. The argument, as I understood it, was as follows. It was said that the present was an entirely novel case, a case in which there was a *de facto* government recognized as such by His Majesty's government, and at the same time a Sovereign—namely, the fugitive Emperor — recognized as a *de jure* monarch on the other. It was suggested that under those circumstances it was open to this Court to depart from the duty carefully indicated by Bankes L. J. in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1)—namely, the duty of treating the acts of the *de facto* government with all the respect due to the acts of a duly recognized foreign Sovereign State—and that it was open to this Court and, indeed, its duty, to test the validity of those acts by some special test: and the first such test suggested was whether the acts in question were necessary to secure the safety of the occupying army, whose presence secured the government in its position of *de facto* control. It may be (it is of course not necessary for me to express or even to form an opinion on the topic) that such a test may be applicable to measures adopted by the authorities of an army occupying part of the territory of an organized state: but the test seems to me to have no relevance in principle to the case of a *de facto* government set up in an area from

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which the former government has departed, and in which there is no governmental authority except that of the de facto government. The de facto government must necessarily make such provision as may be proper for regulating the concerns of the inhabitants, and cannot confine itself to the protection of its military forces. It must necessarily, in such circumstances, assume the full responsibility of government, and its acts must, I should have thought, necessarily have the status of acts of a fully responsible government.

It was then sought, as I understood, to argue that the recognition of some measure of sovereignty de jure in the fugitive Emperor logically led to the denial of full sovereignty to the de facto government: and it was, as I understood, suggested that there existed this limitation on the acts of the de facto government which are to be recognized as internationally valid, that they must be acts which are strictly necessary for preserving peace, order and good government within the area controlled by the de facto government. This seems to me to be entirely inconsistent with the authorities to which I have already referred, and in principle to be fallacious. The recognition of the fugitive Emperor as a de jure monarch, appears to me to mean nothing but this, that while the recognized de facto government must for all purposes, while continuing to occupy its de facto position, be treated as a duly recognized foreign sovereign state, His Majesty's government recognizes that the de jure monarch has some right (not in fact at the moment enforceable) to reclaim the governmental control of which he has in fact been deprived. Where, however, His Majesty's government has recognized a de facto government, there is, as it appears to me, no ground for suggesting that the de jure monarch's theoretical rights (for ex hypothesi he has no practical power of enforcing them) can be taken into account in any way in any of His Majesty's Courts.

This being my view it is perhaps superfluous to point out that even if I could accede to the last mentioned argument, and if I were free to test the acts of the de facto government by the test of such acts being necessary for preserving peace,

order and good government, the test could hardly fail to lead to my accepting as valid the acts questioned in the present case. It is difficult to see how confusion could fail to ensue if the only bank of issue in the country were allowed to continue its business under the control of persons who, until the last moment, seem to have been engaged in strenuous attempts to assist the displaced government to resist the attacks of those who have become the de facto government. But I need not pursue this topic since I am in my view not free to apply any such test.

I turn now to the proceedings in the present case. This action was started on September 29, 1936, in the name of the Bank of Ethiopia under the authority of some person or persons (apparently Mr. Collier and various persons in Europe who before the liquidation were directors of the bank) who are not acting under the direction or with the approval of the liquidator. The defendants are the National Bank of Egypt, who appear to have been the correspondents of the Bank of Ethiopia in Cairo and London. The Bank of Ethiopia in substance claims a settlement of outstanding accounts between the two banks. As I understand it, there is no dispute that these accounts must, as between the proper parties, be ultimately adjusted: but the question at once emerged whether the right party to adjust the accounts with the National Bank of Egypt is not the liquidator appointed as I have above stated. The matter has been brought to a head by the settlement of two preliminary issues, and these issues now come before me for trial. The issues are as follows:—

(1.) Whether the Bank of Ethiopia has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

(2.) If the Bank of Ethiopia has not so ceased to exist, whether it has authorized this action to be brought.

Since the issues were settled, the liquidator appointed in accordance with the law as administered by the de facto government in Ethiopia has been added as a party. In my view, as already stated, of the facts and the law I must on these issues make declarations to the following effect:—

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(1.) That the Bank of Ethiopia has, by virtue of the laws of the country under the laws whereof it was incorporated, been dissolved, and has accordingly ceased to exist except in so far as may be necessary for the liquidation of its affairs.

(2.) That this action, having been brought otherwise than by or under the authority of the defendant Liguori, the duly constituted liquidator of the Bank of Ethiopia, has not been authorized by that bank.

Solicitors: *Norton, Rose, Greenwell & Co.; Wordsworth, Marr, Johnson & Shaw; Park, Nelson & Co.; Sanderson, Lee & Co.; Mills, Lockyer, Church & Evill.*

K. R. A. H.

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June 1.

[No. 3890.]

Compulsory Purchase—Land required for Waterworks—Previous sale of land subject to reservation of all surface or underground water for benefit of adjoining land—Covenant by purchaser with owner for time being of adjoining land not to cause water supply from land sold to be diminished—Covenant running with land—"Injurious affection" to adjoining land—Compensation—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68—Public Works Facilities Act, 1930 (20 & 21 Geo. 5, c. 50), s. 2.

By agreements made in 1904 and subsequent years a local authority agreed with the then owner of the S. estate for a supply of water from a pumping station and well on the S. estate.

In 1932, S., who had become entitled to the S. estate, sold and conveyed a portion of it, not including the pumping station and well, to X in fee simple. The conveyance to X contained certain reservations and a covenant so framed as, if enforceable, to run with the land conveyed for the benefit of the remaining portion of the S. estate. The reservations purported to reserve all water (whether surface or underground) in or under any portion of the property so conveyed to X, and all necessary easements rights privileges advantages powers and liberties necessary for the enjoyment of that reservation. The covenant was not to do anything on the property so conveyed whereby the water supply then obtained therefrom or any part thereof or any supply thereafter to be obtained therefrom in addition to or in substitution therefor should be in any way diminished or the purity impaired.

In April, 1934, the local authority made a compulsory purchase order under s. 2 of the Public Works Facilities Act, 1930, for the compulsory purchase of part of the property so conveyed to X for the purpose of obtaining water therefrom and for the construction of a reservoir and certain works. This order incorporated s. 68 of the Lands Clauses Consolidation Act, 1845.

S. claimed compensation on the ground that the S. estate and the reservations and restrictions imposed for the benefit of the S. estate by the conveyance of 1932 would be injuriously affected by the proposed works on the land comprised in the compulsory purchase order.

The parties having failed to come to terms, an official arbitrator was appointed, who subsequently acted as an agreed arbitrator under the Lands Clauses Consolidation Act, 1845.

In his award the arbitrator found (a) that a pumping station if erected on the portion of X's land comprised in the compulsory purchase order would probably tap water which would otherwise

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percolate to the area tapped by the local authority's existing pumping station and well on the S. estate and might affect the quantity of water reaching such area, and (b) that a pumping station on the proposed site would not be likely to tap any water which, in the absence of such a pumping station, could not be tapped by pumping at the local authority's existing works. He consequently awarded S. a certain sum by way of compensation, but made his award in the form of a special case, referring to the Court the question whether S. was entitled to be compensated for the injurious affection of his adjoining estate and the interests easements and restrictions appertaining thereto by reason of the proposed works of the local authority and the facts so found by him:—

Held, (1.) that though the attempt to reserve percolating water out of the land conveyed by the conveyance of 1932 failed, the reservation therein contained ought to be construed as a reservation of all necessary rights to enable S. to obtain water from the land conveyed; and that the covenant imposed a contractual prohibition on X and those deriving title under him from doing anything to interfere with the existing and future water supply at the existing works on the S. estate. The claimant therefore had an interest in land which was affected by the compulsory purchase order.

(2.) that the injury to the S. estate arose from the "execution of the works" within the meaning of s. 68 of the Lands Clauses Consolidation Act, 1845; since the statutory powers vested in the local authority under s. 51 of the Public Health Act, 1875, authorized the construction and maintenance of waterworks for the supply of water, and in order to supply water, it was necessary to draw water from the land taken.

The claimant therefore was entitled to recover by way of compensation the amount awarded to him under the arbitrator's award.

Fletcher v. Birkenhead Corporation [1907] 1 K. B. 205 applied.

Hammersmith and City Ry. Co. v. Brand (1868-9) L. R. 4 H. L. 171, distinguished.

SPECIAL CASE.

This was an award stated in the form of a special case at the request of Sir John W. B. Simeon, Bart., the estate owner in fee simple of an estate known as the Swainston estate in the parish of Calbourne in the Isle of Wight (hereinafter called "the claimant"), and the Isle of Wight Rural District Council (hereinafter called "the council") by an official arbitrator appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919, acting as an agreed arbitrator under the Lands Clauses Consolidation Act, 1845.

By an agreement dated August 18, 1904, Sir John Stephen

Barrington Simeon, Bart., who was then the owner of an estate in the parish of Calbourne in the Isle of Wight known as the Swainston estate, and who was a predecessor in title of the claimant, granted to the council for a term of 999 years the right to enter upon a piece of land, coloured yellow on the plan annexed thereto and marked "A," forming part of a farm known as Pitts Farm on the Swainston estate for the purpose of searching for and taking water from such land, in order to obtain a supply of water for domestic purposes for the parish of Calbourne, and to make a reservoir on another piece of land forming part of Pitts Farm at the point marked "B" thereon, and to lay a pipe-line leading thereto, with all necessary ancillary powers.

By the agreement the council agreed to pay to Sir John S. B. Simeon 500*l.* for the privileges thereby granted, to provide a free supply of water for a farm named therein, not to extend their mains or water supply outside the then existing boundaries of the parish of Calbourne without the previous consent in writing of Sir John S. B. Simeon, and not without the like consent to levy water rates, rents or charges upon the owners or occupiers as the case might be of any premises that might thereafter be supplied with water in the parish of Calbourne in excess of a certain specified scale.

Three agreements supplemental to the agreement of August 18, 1904 (hereinafter called "the principal agreement"), were subsequently entered into with the council by the respective owners of the Swainston estate at the respective dates of those supplemental agreements. The effect of these agreements was to confer on the council the right to make certain additional works, to use the water taken by the council in connection with their duties as a highway authority on payment of a specified sum per 1000 gallons of water, and to supply water obtained from the works authorized by the principal and supplemental agreements to certain other parishes in the Isle of Wight, in addition to the parish of Calbourne. The water supplied to these other parishes was to be paid for at the rate of 2*d.* per 1000 gallons of water. This power was, however, subject to a proviso that the supply

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During the years 1924 to 1935 the council obtained a supply of water from the claimant by means of a well and pumping station at points "A" specified in the principal and supplemental agreements, the terms of the principal and supplemental agreements being extended so as to enable the council to take water under the terms of those agreements from the existing works to augment the supply of water from other sources to the parish of Shalfleet, and in 1934 the council were by agreement also allowed to take water under the terms of those agreements for the purpose of augmenting the supply of water to West Wight.

By a conveyance dated July 14, 1932, the claimant conveyed part of Pitts Farm in the parish of Calbourne (being part of the Swainston estate) to a purchaser, one P. R. Strickland (in the conveyance called "the sub-purchaser"), in fee simple. This conveyance did not include the site of the well and pumping station from which the council obtained their supply of water under the principal and supplemental agreements, which remained part of the Swainston estate. The conveyance was expressed to be subject to the reservations and rights set out in the second schedule thereto and also to the covenant contained in the third schedule. It was agreed at the hearing before the Court that the covenant in the conveyance was so framed that, if it was an enforceable covenant, it would run with the land conveyed for the benefit of the Swainston estate. The reservations in favour of the remaining part of the Swainston estates were, first, all water (whether surface or underground) in or under any part of the property thereby conveyed and all necessary easements, rights of way, privileges, advantages, powers and liberties necessary for the full enjoyment of the reservation, together with certain other rights more fully referred to in the judgment of the learned judge; and secondly, all moneys, rents and other payments, which might be payable or receivable by the vendor (the claimant) as owner of the Swainston estate, in connection with the first reservation, and also all moneys,

rents and other payments then payable or thereafter to become payable by the council under or by virtue of the principal and supplemental agreements under which the council was then obtaining a supply of water from Pitts Farm and the adjoining property of the vendor (the claimant) and all easements, rights, privileges, advantages and liberties already then enjoyed by the council in connection with the existing supply over any part of the said property thereby conveyed and all pipes and apparatus connected therewith. The covenant (which is fully set out in the judgment of the learned judge) was that "the sub-purchaser" of the property thereby conveyed and his successors in title would not do anything on the property so conveyed or any part or parts thereof whereby any supply of water then obtained therefrom or any part thereof, or any supply thereafter to be obtained therefrom, in addition to or in substitution therefor, should be diminished or the purity thereof impaired.

On April 17, 1934, the council made a compulsory purchase order under the Public Works Facilities Act, 1930, s. 2, authorising them to purchase compulsorily, for the purpose of obtaining water and in construction of works, etc., in connection therewith, approximately fifteen and a half acres of land (hereinafter called "the new site"), being part of Pitts Farm in the parish of Calbourne. The new site was some distance away from the part of Pitts Farm where the council's pumping station and well had been placed by virtue of the principal agreement. A public local inquiry was held on June 14, 1934, and on August 11, 1934, the council's order, dated April 17, 1934, was confirmed by the Minister of Health. On March 6, 1935, the claimant put in a claim (subsequently amended on November 13, 1935) for compensation for alleged injurious affection to his adjoining Swainston estate, and, the parties not being able to come to terms as to the amount of compensation to be paid by the council, an official arbitrator was appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919, who subsequently, by agreement between the parties, acted as an agreed arbitrator under the Lands Clauses Consolidation Act, 1845.

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On February 13, 1937, he made his award, awarding the claimant, S., the sum of 6000*l.* by way of compensation. The matter was now brought before the Court at the request of both parties by way of a special case, as above stated.

A. F. Topham K.C. and *L. W. Byrne* for the claimant.

By the conveyance of July 14, 1932, of the property therein described and conveyed to the sub-purchaser the benefit of certain interests, easements, rights, advantages and powers was reserved to the vendor (the claimant) as the estate owner in fee simple of the adjoining Swainston estate, and certain covenants were entered into by the sub-purchaser affecting the land conveyed (namely, Pitts Farm). The acquisition by the council from the sub-purchaser of the property for which they gave the notice to treat for the purpose for which it is being acquired will deprive the Swainston estate of the benefit of these reservations and covenants. The claimant is therefore entitled to be compensated under s. 68 of the Lands Clauses Consolidation Act, 1845, for the injurious affection of the Swainston estate by such acquisition.

Compensation is payable if injurious affection has been caused to land by depriving the land of the benefit of an easement: see *Clark v. School Board for London*. (1) The question of compensation may arise also on breach of a covenant: see *Manchester, Sheffield and Lincolnshire Ry. Co. v. Anderson* (2) and *Long Eaton Recreation Grounds Co. v. Midland Ry.* (3) Under s. 68 of the Lands Clauses Consolidation Act, 1845, a person is entitled to compensation in respect of lands or any interest therein which have been taken or injuriously affected by the execution of works. That is the section under which compensation is claimed. The claimant's case is that he is injuriously affected by the proposed works of the council.

The statutory powers under which the council are acquiring the new site are those conferred by s. 51 of the Public Health Act, 1875, relating to the supply of water. By this section

(1) (1874) L. R. 9 Ch. 120.

(2) [1898] 2 Ch. 394.

(3) [1902] 2 K. B. 574.

the council is authorized to construct and maintain water-works and do other necessary acts for the purpose of the supply of water. The execution of the works therefore includes the making of a reservoir and the pumping of water for the purpose of filling it and keeping it filled: see *Fletcher v. Birkenhead Corporation*. (1) The works authorized by s. 51 of the Public Health Act, 1875, are entirely different from the works authorized by the Railways Clauses Acts, and the decision in *Hammersmith and City Ry. Co. v. Brand* (2) does not apply to waterworks.

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C. E. W. Simes for the council. Though compensation can be awarded under and by virtue of s. 68 of the Lands Clauses Consolidation Act, 1845, yet, it is submitted, three factors must be satisfied before a right to compensation under the section arises: (1.) It must be for an "interest in land"; (2.) the injurious affection must arise from the exercise of the right to construct the works; and (3.) the injurious affection must be an "injuria," and not a mere "damnum sine injuria," that is, it must be a legal right.

It is submitted that water cannot be the subject of property unless and until it has been reduced into possession: *Race v. Ward*. (3) No right or property in percolating water is known to the law.

In none of the reservations in the deed of 1932 is there any right in the land reserved. In the first reservation nothing is reserved in the nature of an "interest in land," and in the second there is merely a reservation of money that might become payable—that is not an "interest in land." Even if the covenant was an "interest in land," no evidence has been produced that the land forming the remainder of the Swainston estate would suffer injury.

On the construction of the covenant, "not to do anything on the said property hereby conveyed . . . whereby any supply of water obtained therefrom . . . shall be diminished"; such a covenant can only apply to water which has actually reached some defined channel or reservoir:

(1) [1907] 1 K. B. 205. (3) (1855) 4 E. & B. 702, 709.
(2) (1868-9) L. R. 4 H. L. 171.

LUXMOORE *Mayor, &c., of Bradford v. Pickles*. (1) See Lord Watson's remarks at p. 597. In this covenant the word "therefrom" must mean from "the property hereby conveyed," and the well from which the council obtains the water was not conveyed by the conveyance. The water could only be obtained at the place where it has been reduced into possession.

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It is submitted that this covenant was drawn on the false assumption that percolating water can be the subject of property.

On the second point whether damage (if any) would arise from the user of the works after their execution, the powers given by the Waterworks Clauses Act, 1847, ss. 6 and 12, relate to maintenance and user as well as construction: see *Fletcher v. Birkenhead Corporation*. (2) This particular s. 6 was not incorporated into the Public Health Act, 1875, s. 57. Here compensation (if any) can only be claimed under s. 68 of the Lands Clauses Consolidation Act, 1845, for injurious affection by the "execution of the works."

In the railway cases, such as *Hammersmith and City Ry. Co. v. Brand* (3) the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, were dealt with. Sect. 68 limits compensation in this case to the construction of the waterworks. The "construction" of these works will not injure the plaintiff; only the "user" could.

A. F. Topham K.C. in reply. The claimant is entitled to compensation, that is, he is within s. 68, because he has "lands" which have been "injuriously affected" by reason of the covenants in the conveyance of 1932 having been broken.

Though *Chasemore v. Richards* (4) and *Mayor, &c., of Bradford v. Pickles* (1) establish the principle that there is no right to percolating water at common law, these cases do not establish the proposition that a right to the flow of percolating water cannot be created by express grant. This possibility was recognized in the speeches in both cases, and

(1) [1895] A. C. 587, 597.

(2) [1907] 1 K. B. 205, 211.

(3) L. R. 4 H. L. 171.

(4) (1859) 7 H. L. C. 349.

in *Chasemore v. Richards* (1) the actual decision in *Dickinson v. Grand Junction Canal Co.* (2) was justified on the ground of reliance on the express agreement.

Although the Public Health Act, 1875, does not incorporate ss. 6 and 12 of the Waterworks Clauses Act, 1847, the works which are authorized are similar and come within the ratio decidendi in *Fletcher v. Birkenhead Corporation*. (3)

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LUXMOORE J. On September 11, 1934, the Isle of Wight Rural District Council served upon Sir John Walter Barrington Simeon, Bart. (hereinafter referred to as "the claimant"), a notice to treat in respect of some fifteen acres of land in the parish of Calbourne in the Isle of Wight, forming part of a farm known as Pitts Farm. The claimant is not the owner of the land comprised in the notice, but he is the owner of an estate called the Swainston estate, which adjoins Pitts Farm, and as such he claims to be entitled to the benefit of certain reservations, restrictions and easements reserved out of and imposed upon the land comprised in the notice. The notice was served by the council in pursuance of the powers conferred on it by the Public Works Facilities Act, 1930, s. 2, and the Isle of Wight Rural (Public Works Facilities Compulsory Purchase) Confirmation Order, 1934. The purpose for which the land is required is the construction and maintenance of waterworks, and the supply of water for certain districts under the jurisdiction of the council, in accordance with the powers conferred by the Public Health Act, 1875, ss. 51 to 70.

The claimant claimed a sum of 7500*l.* for the injurious affection of the Swainston estate, by reason of the compulsory acquisition of the land comprised in the notice for the statutory purposes authorized. The claim was made under s. 68 of the Lands Clauses Consolidation Act, 1845, which is incorporated in the 1930 Act and the 1934 Order. The council and the claimant were unable to agree the amount of compensation, and accordingly the question was referred to Mr. Hugh

(1) 7 H. L. C. 349, 369, 378; (2) (1852) 7 Exch. 282.
(1857) 2 H. & N. 168, 186. (3) [1907] 1 K. B. 205.

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Calthrop Webster, one of the official arbitrators appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919. It was subsequently agreed between the parties that Mr. Webster should not proceed under that Act, but should act as an agreed arbitrator under the Lands Clauses Consolidation Act, 1845. Mr. Webster in due course published his award dated February 13, 1937, in the form of a special case under s. 19 of the Arbitration Act, 1889.

The question of law to be determined is whether the claimant is entitled to be compensated for the injurious affection of the Swainston estate and the interests, easements and restrictions appertaining thereto by reason of the facts found by the arbitrator. The arbitrator has assessed the compensation at the sum of 6000*l.*, if the Court is of opinion that the claimant is entitled to be compensated. His award also deals with the incidence of costs in either event.

The only facts to be considered are those found by the arbitrator. Shortly they are as follows: [His Lordship stated the facts.] The arbitrator has found that no water flowing in any known or defined channel is tapped by the council's works erected under the principal and supplemental agreements (to which he refers in his award as the "existing works," and to which I will refer by the same description), or would be tapped by the works proposed to be erected on the land to be acquired compulsorily. He has also found (*a*) that a pumping station, if erected on the "new site" (that is the land referred to in the notice to treat), would probably tap water which would otherwise percolate to the area tapped by the "existing works" of the council, and might affect the quantity of water reaching such area; and (*b*) that a pumping station on the "new site" would not be likely to tap any water which, in the absence of such a pumping station, could not be tapped by pumping at the "existing works."

The council propose to erect on the "new site" a pumping station to supply a new reservoir with a capacity of 500,000 gallons, and it is anticipated that a minimum of 100,000 gallons of water, and possibly as much as 250,000 gallons of water, will be drawn from the "new site" in each twelve-hour

pumping day. On the findings of the arbitrator any water delivered to the new reservoir would probably have been available for the existing works.

It is, I think, settled law that in all cases where land is subject to a burden which runs with it for the benefit of other land, a purchaser taking under compulsory powers takes the land subject to that burden like any other purchaser; but the covenant cannot be enforced by injunction in the Courts if the breach of it is attributable to the execution of the works authorized by the statute under which it was taken, or to the exercise of the statutory powers thereby conferred on the purchaser. The law is stated by Lord Lindley in the case of the *Manchester, Sheffield and Lincolnshire Ry. Co. v. Anderson*. (1) In that case the property was leasehold, and the covenant in question was one for quiet enjoyment; but there is no difference in principle between such a case and a restrictive covenant running with the land with regard to freehold property. The passage to which I wish to refer is as follows: "Let us see what is the effect of the covenant for quiet enjoyment upon the railway company. They have bought the reversion, and, like other assignees of a reversion, they are bound by the covenant, for it runs with the land. I do not see any reason for holding that the covenant has gone, or in any way been extinguished. The company must be bound like any other assignee of a reversion—it is not a question of obligation on the company, but a question of remedy. When we consider the remedy I fail to see the answer to the contention of the railway company. They say: 'You cannot bring an action against us on the covenant or otherwise for anything we are doing lawfully under our statutory authority.' It is said that then the covenant is of no use to the defendant; but it is of very considerable use to him, for it may give him rights of compensation which otherwise he might not have. He may be able to prove, having regard to his covenant, that his land is injuriously affected when he could not prove it if he had no such covenant. Suppose, for instance, that this is a house less than 20 years

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LUXMOORE old, and suppose the railway company had not bought the reversion, and that they made an excavation which let the house down, it is possible that letting it down would be no actionable wrong. But that could not possibly be the case where the company are bound by a covenant of this kind, because whether the house was new or old the assignee of the reversion could not lawfully let it down except under their statutory powers. The covenant, therefore, is by no means inoperative; it binds the company just as it would bind any one else. But when you come to the question of the remedy for an infringement of the covenant, you must look at the Act of Parliament. There may be other covenants binding on the company for breach of which an action might well lie, because a breach of them could not be attributable to the execution of the works authorised by the statute. Suppose, for example, there were a covenant by the lessor to keep the place insured. A breach of that covenant could not arise from the construction of the works under the Act. An action would lie against a railway company for the breach of a covenant like that, but for any breach of covenant that is authorised by the Act of Parliament there is no remedy at all except under the compensation clauses." Mr. Simes on behalf of the council accepted this view; but he argued that the reservations and restrictions in this case are unenforceable by the claimant as against the original purchaser under the conveyance of July 14, 1932. He argued, as I understand him, that the reservations confer no legal right or interest in land and that the restrictions, if construed strictly with reference to the reservations, are meaningless, and consequently are inoperative to confer on the owner for the time being of the Swainston estate any right or interest in land. The first reservation is of "all water (whether surface or underground) in or under any part of the said property hereby conveyed." Mr. Simes argued, and I agree with him, that water is not the subject of property. As was pointed out in the well known case of *Race v. Ward* (1) water is "no part of the soil.

like sand, or clay, or stones; nor the produce of the soil, like grass, or turves, or trees , and, when it issues from the ground, till appropriated for use, it flows onward by the law of gravitation. While it remains in the field where it issues forth, in the absence of any servitude or custom giving a right to others, the owner of the field, and he only, has a right to appropriate it; for no one else can do so without committing a trespass upon the field; but, when it has left his field, he has no more power over it, or interest in it, than any other stranger." There is however nothing to prevent the owner of land giving another the right to enter upon his land in order to obtain a supply of water from it, and for that purpose to dig wells, make reservoirs and lay pipes, or execute any other specified works. I agree with Mr. Simes that the attempt to reserve all water out of the land conveyed by the conveyance of July 14, 1932, has no legal effect, so far as that reservation is concerned; but I disagree with him when he says that consequently no meaning can be given to the words that follow, so as to confer any right or easement in respect of water in or under the land conveyed. The reservation of "all necessary easements, rights of way, privileges, advantages, powers and liberties for the full enjoyment of this reservation" can, and in my judgment ought, to be construed as the reservation of all necessary rights to enable the grantor reserving those rights to obtain water from the land conveyed. This meaning of the parties is I think made clear by the later words of the reservation: "It is hereby declared that this reservation is not to prevent or hinder the sub-purchaser of the said property at his own cost from taking water (whether surface or underground) from his own premises for all agricultural and domestic purposes connected with the use and enjoyment of such premises but not for sale or use on any other property without the consent of the vendor or other the owner for the time being of the water excepted from this conveyance." It is quite true that there is no legal owner of the water excepted in the strict sense of the words, and if these words stood alone

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LUXMOORE there would be surer ground for Mr. Simes' argument, but
J. they do not stand alone. The rest of the conveyance, and
1937 in particular the heading in the second schedule, makes it
SIR JOHN clear that the person referred to as the owner of the water
W. B. reserved is "the estate owner for the time being of the
SIMEON, BT., remaining part of the Swainston estate." If the grant of the
AND easements and rights had stood alone and the attempted
ISLE OF reservation of the water had been omitted, there could be
WIGHT no doubt but that the easements and rights would have been
R. D. C., valid and would, in the events that have happened, confer
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giving the same effect to the reservation of these easements
and rights, although the words attempting to reserve water
in or under the land conveyed are present. So far as the
covenant is concerned, the position is I think clearer. It is
that the covenantor "and his successors in title will not do
anything on the said property hereby conveyed or any part
or parts thereof whereby any supply of water now obtained
therefrom or any part thereof or any supply hereafter to be
obtained therefrom in addition to or in substitution therefor
shall be diminished or the purity thereof impaired." It is
plain that at the date of the conveyance the owner of the
Swainston estate was receiving at the existing works, through
pipes laid through Pitts Farm, water which was derived from
and under Pitts Farm. Mr. Simes argued that in the case
of percolating water, there is no supply of water except at
the point where it is drawn off and that consequently the
covenant is meaningless. I see no reason to adopt such a
construction when it is possible to give a sensible meaning
to the words used. In my judgment, reading the covenant
in the light of the rest of the conveyance and bearing in mind
the surrounding circumstances, the covenant ought fairly to
be construed as imposing a contractual prohibition on the
covenantor and those deriving title under him from doing
anything to interfere with the existing and future water
supply at the existing works. In my judgment there is
nothing in the speeches of the members of the House of Lords

in the case of *The Mayor, &c., of Bradford v. Pickles* (1) to prevent me from so construing the covenant. On the contrary I think I ought if possible to give a sensible meaning to the covenant rather than to adopt a construction so strict as to render it a dead letter. It follows from what I have said that in my judgment the claimant has an interest in the land which is the subject of the compulsory notice.

Mr. Simes further argued that no compensation can be given in respect of these interests, because any injury caused to the claimant will not arise from the construction of the council's proposed works but only from the user of those works; and in support of that argument he relies on the decision in the *Hammersmith and City Ry. Co. v. Brand*. (2) The decision in that case turned on the particular phraseology of s. 6 of the Railways Clauses Act. In the present case, the Public Health Act, 1875, s. 51, authorizes the construction and maintenance of waterworks for the supply of water. It seems to me that although the material section of the Waterworks Clauses Act is not incorporated in the particular statutes and orders governing the present case, the reasoning to be found in the judgment of the Court of Appeal in *Fletcher v. Birkenhead Corporation* (3), and especially the reasoning to be found in the judgment of Farwell L.J., applies to the present case and distinguishes it from the decision in the *Hammersmith and City Ry. Co. v. Brand* (2), because the statutory powers in this case are to construct and maintain waterworks and to supply water. In order to supply water it is necessary to draw the water from the land taken, and this is an execution of the works authorized. The words of s. 68 of the Lands Clauses Consolidation Act are not, as in the case of s. 6 of the Railways Clauses Act, "construction of the works," but "execution of the works." In my judgment the latter words are wider than the former and include the exercise, that is the carrying out and the execution of the appropriate statutory powers.

For these reasons, I am of opinion that the question

(1) [1895] A. C. 587.

(2) L. R. 4 H. L. 171.

(3) [1907] 1 K. B. 205, 218.

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LUXMOORE submitted by the arbitrator should be answered in the affirmative, with the result that the claimant is entitled to recover under the award of the arbitrator the sum of 6000*l.* The council must pay the costs of the special case.

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Solicitors: *Emmet & Co., for Gunner, Wilson & Jerome, Newport, Isle of Wight; Russell-Cooke & Co., for Strattons, Newport, Isle of Wight.*

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Local Government—County Council—Voting powers of member—Electoral division part of borough—Local Education Authority—Education Committee—Maternity and Child Welfare Sub-committee—Prohibition of right to vote on certain questions—Whether applicable to voting on matters referred or delegated to committees—Education Act, 1921 (11 & 12 Geo. 5, c. 51), s. 9—Local Government Act, 1933 (23 & 24 Geo. 5, c. 51), s. 75.

Under s. 9 of the Education Act, 1921, the county councillors elected for an electoral division consisting wholly of a borough or urban district whose council are a local education authority for the purpose of elementary education, or of some part of such a borough or district, are prohibited from voting in respect of any question arising before the county council which relates to elementary education.

Under s. 75 of the Local Government Act, 1933, a county councillor elected for an electoral division consisting wholly of a county district or of some part of a county district shall not vote on any matter involving only expenditure for which the county district is not for the time being liable to be charged:—

Held, that both these prohibitions applied to voting not only at meetings of the county council but also at meetings of the education committee of the council and any sub-committee thereof, and that the second prohibition under the Local Government Act, 1933, applied to voting both at meetings of the council itself and at meetings of the public health and housing committee and of the maternity and child welfare sub-committee of that committee on all questions of maternity and child welfare.

The plaintiff as a member of the Essex County Council for an electoral division of Colchester, a borough the council of which was the local education authority for the purposes of elementary education, and a separate district for the purposes of the Maternity and Child Welfare Act, 1918, was therefore within the above prohibitions, and could not vote at any meetings of these committees or sub-committees on any matters delegated or referred to them.

SUMMONS.

The plaintiff, Mrs. Catherine B. Alderton, of Colchester, was a member of the Essex County Council, having been elected in March, 1928, as the member for the Colchester South electoral division. This division was wholly comprised in part of the borough of Colchester. She was also a member of the education

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committee of the council and of the education finance sub-committee of that committee, also of the public health and housing committee of the council and of the maternity and child welfare sub-committee of that committee.

The council of the borough of Colchester was the local education authority for the purposes of elementary education, and the plaintiff was therefore within the prohibitions against voting on matters coming before the council relating to elementary education imposed by s. 9 of the Education Act, 1921. (1) The Colchester borough council was the maternity and child welfare authority for the borough. The plaintiff as a county councillor was therefore subject to the prohibition against voting in the proviso to s. 75 of the Local Government Act, 1933 (2), in regard to matters involving expenditure on maternity and child welfare services.

The plaintiff however contended that these prohibitions against voting on certain questions applied only to voting at meetings of the county council itself, and not to voting at meetings of the education committee or any sub-committee thereof, or at meetings of any other committees or sub-committees of the council, and that she was free to vote at such meetings.

The summons was issued by the plaintiff to obtain the opinion of the Court upon the questions whether the plaintiff was prohibited either under s. 9 of the Education Act, 1921, or s. 75 of the Local Government Act, 1933, from voting on questions of education at meetings of the education committee

(1) Education Act, 1921, s. 9: "The county councillors elected for an electoral division consisting wholly of a borough or urban district whose council are a local education authority for the purpose of elementary education, or of some part of such a borough or district, shall not vote in respect of any question arising before the county council which relates only to elementary education."

(2) Local Government Act, 1933, s. 75: "The provisions of Parts

I. to V. of the Third Schedule to this Act shall have effect as respects the meetings and proceedings of local authorities and of committees thereof."

"Provided that a county councillor elected for an electoral division consisting wholly of a county district or of some part of a county district shall not vote on any matter involving only expenditure on account of which the county district is not, for the time being, liable to be charged."

or any sub-committee thereof ; or under the above mentioned Act of 1933 from voting at meetings of the public health and housing committee of the council, and the meetings of the maternity and child welfare sub-committees of that committee.

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Wilfrid M. Hunt for the plaintiff. The question raised by the summons practically concerns the construction of s. 9 of the Education Act, 1921 (1), and s. 75 of the Local Government Act, 1933. (2) It is in the nature of a test case. Taking the Act of 1921 first, it is submitted that the words in the last three lines of the section : " shall not vote in respect of any question arising before the county council, etc.," refer to voting at "*meetings*" of the council on questions relating to elementary education. It would not disqualify the plaintiff from voting at meetings of the education committee of the council. Further by s. 4, the Act has dealt separately with matters which " shall " stand referred to the education committee of the council, appointed by sub-s. 1 thereof. See also sub-cl. (b) of sub-s. 2 of that section. By s. 9 (1) the " council " only is referred to, therefore the provisions of s. 9 cannot affect s. 4, which is a distinct section, and quite separate from s. 9. It should further be noted that in s. 9 only " county councillors " elected, as in this case, for a borough electoral division whose council are a local education authority and who were members of the education committee are prohibited. The prohibition does not extend to additional members of the education committee who were not members of the county council.

Secondly, as regards s. 75 of the Local Government Act, 1933 (2), the proviso to that section only concerns the meetings of the county council itself. In the first part of the section, committees are specially referred to—namely, " and of committees thereof " : see Part V. of the Third Schedule relating to local authorities generally, especially cl. 3, sub-cl. 1 and 2, and cl. 5, where committees are separately treated. This shows that s. 75, though it excludes voting, as stated in the

(1) See note (1) ante, p. 542.

(2) See note (2) ante, p. 542.

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proviso, at meetings of the council, does not expressly prohibit it at meetings of committees, since it speaks of the meetings and proceedings of local authorities—namely, county councils and of committees thereof; and then brings in the Third Schedule.

On s. 9 of the Act of 1921, regard may also be had to the side-note to the section: "Voting in county council." Again where county councillors are not intended to vote, they are to be excluded from voting in the council itself. It seems to be an illustration of the maxim "No taxation without representation"; this is not applicable to committees which are separate and not affected by the prohibition in the section. Sect. 9 cannot apply to the right of the plaintiff to vote at committees; she has this right and neither of the sections 9 of the Act of 1921 nor 75 of the Act of 1933 deprive her of it.

C. S. Rewcastle K.C. and *Geoffrey C. Hutchinson* for the defendant council. The principle underlying the prohibition was to keep county councils and the borough councils independent of each other in respect of these questions of voting on matters of elementary education. The committees are part of the council; a council consists of the council itself and its committees, therefore the prohibition in the Act of 1921 applies to both. There could be no question of delegation to a committee; the reference to a committee or a delegation of its powers as stated in s. 4 of the Act of 1921 must have come before the council: compare *Young v. Cuthbert*. (1) In the case of the education committee of this council, it must be treated as the county council itself and the prohibition applies. Even if it could be said that it was acting as agent for the council, an act of the agent is the act of the principal: see *Richardson v. Abertillery Urban District Council*. (2)

Sect. 75 of the Local Government Act, 1933 (3), expressly deals with local authorities and its committees, there is no distinction. The plaintiff cannot vote either in the council or any of its committees.

(1) [1906] 1 Ch. 451, 462.

(2) (1928) 138 L. T. 688, 690.

(3) See note (2) ante, p. 542.

Wilfrid M. Hunt in reply. Sect. 75 of the Local Government Act, 1933, is a qualification on voting at a meeting of the council itself; and voting in committees is not touched by it.

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LUXMOORE J. The plaintiff is a member of the Essex County Council, having been elected in the month of March, 1928, for the Colchester South electoral division, which is wholly within the borough of Colchester. She is also a member of the education committee of that county council and of the education finance sub-committee, which is a sub-committee of the education committee. She is also a member of the public health and housing committee of the county council and of the maternity and child welfare sub-committee of the last named committee.

The Essex County Council has challenged the plaintiff's right to vote at any meetings of these committees and sub-committees and contends that she is precluded from voting at any such meetings by reason of the provisions, in the case of the education committee and the education finance sub-committee, of s. 9 of the Education Act, 1921 (1), and s. 75 of the Local Government Act, 1933 (2), or either of those sections. They also contend that she is not entitled to vote at meetings of the public health and housing committee or the maternity and child welfare sub-committee of that committee in respect of matters dealing with maternity and child welfare by reason also of the provisions of s. 75 of the Local Government Act, 1933. (2)

The questions raised are of general importance, and this summons has, I am told, been issued with the approval of the Ministry of Health in order to obtain the opinion of the Court with regard to the true construction of the two sections to which I have referred. The question with regard to the meaning of each section is distinct, and the answers to those questions depend on a consideration of the material sections of each Act. I propose to deal first with s. 9 of the Education Act, 1921. That Act constitutes as separate local education authorities for the purposes of elementary education only the

(1) See note (1) ante, p. 542. (2) See note (2) ante, p. 542.

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respective councils of county boroughs, non-county boroughs with a population in excess of a specified number, urban districts with a population in excess of a larger specified number, and county councils. In the latter case the respective areas of boroughs or urban districts constituting separate local education authorities are excluded from the jurisdiction of each county in respect of elementary education. The borough of Colchester is a non-county borough with a population in excess of the specified number, and is therefore the local authority for the purposes of elementary education, and its area is consequently excluded from the jurisdiction of the defendant county council with regard to elementary education. Sect. 4, sub-s. 1, of the Act provides that every council—that is, whether of a county, county borough, non-county borough or urban district,—having powers under the Act, shall have an education committee or education committees constituted in accordance with the Act, and that (sub-s. 2 (a)),—with certain exceptions not material to the questions now stated,—all matters relating to the exercise by the council of its powers under the Act or of any powers connected with education conferred by or under any other Act, scheme, or order on the council expressly as a local education authority or as a council having powers under the Act (that is the Education Act, 1921), except the power of raising a rate or borrowing money, shall stand referred to the education committee, and the council, before exercising any such powers, shall, unless in its opinion the matter is urgent, receive and consider the report of the education committee with respect to the matter in question. It also provides (b) that the council may delegate to the education committee, with or without any restrictions or conditions as it thinks fit, any such powers as aforesaid, except the power of raising a rate or borrowing money. It is material to notice the distinction between matters referred and powers delegated; in the former cases the committee reports and the council will decide, while in the latter cases the decision is left to the committee itself.

Sub-s. 3 of s. 4, provides for the constitution of the education

committee of a council. It is constituted by a scheme made by the council and approved by the Board of Education in accordance with the provisions set out in the First Schedule to the Act. The scheme (sub-s. 4), when approved, has statutory effect. By sub-s. 5 of s. 4, an education committee may, subject to the directions of the council, appoint such and so many sub-committees consisting either wholly or in part of members of the committee as the committee thinks fit. Sect. 9 (1), which is the section to be construed, provides that county councillors elected for an electoral division consisting wholly of a borough or urban district whose council are a local education authority for the purpose of elementary education, or of some part of such a borough or district shall not vote in respect of any question arising before the county council which relates only to elementary education.

It is admitted that whatever this section may mean the plaintiff is within the prohibition. She contends that the prohibition extends only to voting at meetings of the county council in respect of questions relating to elementary education and does not extend to voting at meetings of the education committee or any sub-committee thereof. The defendant council contends that the prohibition is general and extends not only to voting at meetings of the council, but also to voting at meetings of the education committee or any sub-committee thereof on questions relating to elementary education. Whatever may be the extent of the prohibition, it appears to be directed against a county councillor elected to represent a borough or urban district, or part of a borough or urban district, which is a local education authority so far as elementary education is concerned. Moreover the reason for the prohibition appears to be that the county councillor's constituency makes no contribution to the expenses of or rates imposed by the county council in respect of elementary education in the area under the jurisdiction of the county council.

The First Schedule to the Act of 1921 contains provisions for the constitution of the education committee, which require that the majority of the committee shall be appointed by the

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(1) See note (1) ante, p. 542.

LUXMOORE council and that the persons so appointed shall be persons
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who are members of the council, unless, in the case of a county, the council otherwise determine ; and that the council shall appoint, on the nomination or recommendation of other bodies, persons of experience in education and persons acquainted with the needs of the various kinds of schools in the area over which the council acts, and shall provide for the inclusion of women as well as men among the members of the committee. Part II. of the First Schedule contains provisions as to meetings of the education committee. These provisions confer on the county council power to make regulations as to quorum, proceedings and place of meeting of the education committee, but subject to any such regulations the committee itself is empowered to determine these matters. By cl. 2 of that Part of the Schedule, the chairman of the education committee is given a casting vote. Part III. of the First Schedule disqualifies a person from being a member of the education committee if he is disqualified from being a member of the council appointing the education committee by reason of holding an office or place of profit, or having any share or interest in a contract or employment.

The Essex County Council propounded a scheme under the Act which was duly approved by the Board of Education. The scheme has been amended from time to time, and as so amended the education committee of the council to-day consists of forty-eight members, of whom thirty-two are members of the Essex County Council and the remaining sixteen are not members of the council. These sixteen members who are not members of the council represent educational bodies and have been respectively recommended for appointment by those bodies. No. 55 of the standing orders of the Essex County Council provides that the powers and duties of the council under, among other Acts, the Education Act, 1921, except the power of raising or borrowing money, shall be delegated to the education committee.

It is admitted that the plaintiff cannot, by reason of the provisions of s. 9, which I have just read (1), vote at a meeting

(1) See note (1) ante, p. 542.

of the Essex County Council on any question relating to elementary education, but it is argued that she is entitled to vote on any such question at a meeting of the education committee. It would certainly be anomalous to find that the plaintiff is entitled to vote on a question relating to elementary education which has been delegated to the education committee, although she would be prohibited from voting on that same question at a meeting of the council itself if the question had not been delegated. Mr. Hunt, on behalf of the plaintiff, has argued that this is the necessary construction of the words in s. 9. It is to be observed that the material words of s. 9 are: "shall not vote in respect of any question arising before the county council which relates only to elementary education." Mr. Hunt says that these words are equivalent to the words "shall not vote at any meeting of the county council on any question relating only to elementary education." If the decision is delegated to the committee, the same considerations which led the Legislature to prohibit the person in question voting at a meeting of the county council, apply with equal force to the prohibition of voting on the same question at a meeting of the education committee.

It seems to me that the words "arising before the county council" are more apt to define the question on which the voting is prohibited than the place where the voting is to be prohibited. Any question to be considered by the education committee, be it referred or delegated in the ordinary meaning of the word, arises in the first instance with the county council, and although the word "before" may suggest locality, I do not think it is necessarily confined to such a meaning. Mr. Hunt has further argued that the Act has provided a separate code for meetings of the committee, and that as the council and not any committee of it is referred to in s. 9, the provisions of that section cannot be imported into the separate code. He further argued that the prohibition only extended to members of the education committee who were county councillors, and did not extend to those additional members of the education committee

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LUXMOORE who were not members of the county council, although each
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of them, apart from the fact that they are not members of the county council, might be in the same position as those said to be prohibited from voting. In my judgment, the force of this argument ceases to be of significance when it is remembered that the non county council members are the representatives of educational bodies and are therefore in the position of educational experts on the education committee.

In my judgment, on the true construction of s. 9 of the Education Act, 1921 (1), the plaintiff, by reason of her position as an elected representative of part of a borough which is itself a local education authority in respect of elementary education, is precluded from voting on questions relating only to elementary education at meetings of the education committee and any sub-committee thereof as well as at meetings of the county council.

If however I am wrong in the conclusion at which I have arrived with regard to s. 9 (1), I think the plaintiff is precluded from voting on matters of elementary education only at any meeting of the education committee and the sub-committees thereof by reason of the provisions of s. 75 of the Local Government Act, 1933. (2) That section contains provisions with regard to meetings and proceedings of local authorities and committees thereof which appear to be of general application and to govern all the meetings and proceedings of local authorities and committees thereof, including county councils and county boroughs, non-county boroughs and urban districts; see the definitions of "local authority" and "county district" contained in s. 305 of the Act of 1933. Although s. 9 of the Education Act, 1921 (1), is not repealed by the Local Government Act, 1933, Parts II. and III. of the First Schedule of the Education Act, 1921, to which I have already referred, are specifically repealed: see s. 307, sub-s. 1 (b), and the Eleventh Schedule of the Act of 1933. Sect. 75 is in these terms: "The provisions of Parts I. to V. of the Third Schedule to this Act shall have effect as respects the meetings and proceedings of local authorities and of committees thereof :

(1) See note (1) ante, p. 542. (2) See note (2) ante, p. 542

Provided that a county councillor elected for an electoral division consisting wholly of a county district or of some part of a county district shall not vote on any matter involving only expenditure on account of which the county district is not, for the time being, liable to be charged."

So far as county councils are concerned, the provisions relating to their meetings and proceedings are to be found mainly in Part I. of the Third Schedule. There is no specific mention of the proceedings of committees in it. Part V. of the Third Schedule deals with meetings and proceedings of local authorities generally. There are I think three specific references to committees in it, but the proceedings of committees are dealt with in a different Part of the Act from that in which s. 75 is to be found. Sect. 75 is in Part II. of the Act, that is ss. 57 to 84 inclusive, and this Part of the Act is headed: "General provisions as to members and meetings of local authorities and elections." The provisions relating to committees are to be found in Part III. of the Act, ss. 85 to 97 inclusive, and this Part is headed "committees and joint committees." It is true that the provisions with regard to the proceedings of meetings of a local authority and of committees of a local authority are dealt with separately, but I do not think that this fact is sufficient to enable me to construe the proviso to s. 75 as applicable only to meetings of local authorities and not to committees thereof.

The reason for the prohibition is the same whether the vote is tendered at a meeting of the local authority or at a committee of it, and having regard to the express reference in s. 75 to the proceedings of committees in the first part of that section, I am unable to come to any other conclusion but that on the true construction of the Act the proviso must be construed as being of general application. The words in the section are plain and must, in the absence of some sufficient context, be construed in their ordinary grammatical sense. Notwithstanding Mr. Hunt's able argument, I am unable to find any such context.

The conclusion at which I have arrived applies to the plaintiff not only in her capacity as a member of the education

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committee of the Essex County Council and of any sub-committee of that committee, but also in her capacity as a member of the public health and housing committee and the maternity and child welfare sub-committee thereof so far as matters relating to maternity and child welfare are concerned. The Colchester borough council is a separate district for the purposes of the Maternity and Child Welfare Act, 1918. It raises its own rate and is not liable to be charged with any part of the county rate for that purpose, and the position is therefore, for all practical purposes, the same with regard to this committee so far as it deals with maternity and child welfare, as the position is with regard to elementary education under the Education Act, 1921.

The questions raised by the summons, as originally drafted, were wider than necessary, and I accordingly directed that the summons should be amended so as to cover the specific points argued. On the summons, as amended, I hold that on the true construction of s. 9 of the Education Act, 1921 (1), and s. 75 of the Local Government Act, 1933 (2), the prohibition contained in each of those sections against voting in respect of matters relating to elementary education only, is not limited to voting at meetings of the council itself, but applies also to voting at meetings of the education committee and any sub-committee thereof, and that on the true construction of s. 75 of the Local Government Act, 1933 (2), the prohibition against voting comprised in the proviso to that section is not limited in the case of questions relating to maternity and child welfare to voting at meetings of the council itself but applies also to voting at meetings of the public health and housing committee and the maternity and child welfare sub-committee of that committee.

Solicitors : *Hugh-Jones & Flinn, for L. G. Lewis, Chelmsford ; Sharpe, Pritchard & Co., for E. S. Holcroft, Chelmsford.*

(1) See note (1) ante, p. 542. (2) See note (2) ante, p. 542.

In re EDWARDS' WILL TRUSTS.FARWELL
J.BREWER *v.* GETHING.

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[1936. E. 1200.]

April 15.

Limitation of actions—Mortgage of interest under trust—Security partly realty and partly personalty—Communications from trustees to mortgagees—Whether acknowledgment—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8.

By the Real Property Limitation Act, 1874, s. 8: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent"

By his will the testator, who died in 1865, bequeathed all his real and personal estate to trustees, giving successive life interests therein to M. E., his wife, to E. G., his grandson's wife, and to J. G., his grandson, and directing that after their death the property should be held in trust for their children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares. In 1895, F. G., being one of the sons of J. G. and E. G., mortgaged his share in the freehold and leasehold properties to which he was entitled under the testator's will, and in 1896 he further mortgaged all his interest under the testator's will. The amounts secured thereby were not discharged and no payments of interest were made. In 1919, on the death of J. G. the trust in favour of his children took effect. In 1935, the share of F. G. being then represented by a sum of money on deposit at a bank, the trustees of the will of the testator sent to the persons representing the estates of the respective mortgagees the estate accounts of the testator's estate and the distribution statement:—

Held, (1.) that the trustees of the testator's will were not agents of the mortgagee for the purpose of making an acknowledgment within s. 8 of the Real Property Limitation Act, 1874, and that, accordingly, the sending of the estate accounts and the distribution statement did not constitute such an acknowledgment.

(2.) that, therefore, the debt secured by the first mortgage was barred, inasmuch as it was a mortgage of land.

(3.) that the debt secured by the second mortgage was also barred in so far as the security comprised land at the date of the mortgage.

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The testator, Lewis Edwards, by his will dated December 22, 1860, bequeathed all his real and personal estate to trustees upon trust to permit his wife, Margaret Edwards, to enjoy the rents and annual proceeds thereof during her life and after her death to permit Eliza Ann Gething, the wife of his grandson James Edwards Gething, to enjoy them so long as she should continue to be his wife or widow, and after the determination of the estate limited to her, to permit James Edwards Gething to enjoy the rents and annual proceeds during his life, and after the death of Eliza Ann Gething and James Edwards Gething, in trust for all their children who being sons should attain the age of twenty-one or being daughters should attain that age or marry, in equal shares. The will further provided: "It shall be lawful for and compulsory on my said trustees upon the express request in writing of the said Margaret Edwards, Eliza Ann Gething and James Edwards Gething and the survivor and survivors of them, but not otherwise, and after the death of the survivor of them, at their own discretion, to sell and convert into money the whole or such part of my said property, estate and effects as they may be requested or desired so to do as the case may be, and to lay out and invest the proceeds thereof in the Parliamentary stocks or funds of Great Britain, or at interest upon Government or real or leasehold securities in England or Wales, with power to vary and transpose the same into or for other stocks, funds or securities of the like nature and to hold and stand possessed of the said trust funds and the interest dividends and annual income thereof upon trust for the person or persons who under the trusts aforesaid would have been entitled to receive the same in case no sale or conversion of the property had taken place and for no other trust whatsoever."

The testator died on February 25, 1865: his will was proved by his widow, the executors named having renounced probate. She died intestate on July 18, 1877, leaving part of the estate unadministered. Eliza Ann Gething died in 1878. On October 9, 1878, letters of administration of the estate of the

testator left unadministered were granted to James Edwards Gething. On October 3, 1919, James Edwards Gething died, and the trusts in favour of his children took effect. Those children, of whom Frederick James Edwards Gething was one, attained a vested interest in the testator's residuary estate. The testator's estate comprised personalty and also certain freehold and leasehold property, certain portions of which had since his death been sold at divers times in accordance with the power in the will.

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By a mortgage dated June 5, 1895, made between F. J. E. and J. E. Gething in consideration of 150*l.* paid to the mortgagor by the mortgagee, the mortgagor conveyed to him "all that the one undivided third part or share of and in certain freehold and leasehold properties to which the said mortgagor is entitled under the will of his great grandfather, Lewis Edwards, deceased, to hold to the said mortgagee as to the said freehold property in fee simple and as to the said leasehold property for all the estate and term of the mortgagor therein for securing payment on December 5, 1895, of the principal sum of 150*l.* as the mortgage money with interest thereon at the rate of 5*l.* per cent. per annum until repayment."

A second mortgage, dated February 25, 1896, was as follows: "To Mr. Isaiah Blaiberg, his heirs and assigns. In consideration of your discounting my promissory note for 300*l.* of even date, I, Frederick James Edwards Gething of Sticklepath, Barnstaple, gentleman, do hereby as beneficial owner assign to you the premises in the Schedule hereunder written, as well as any other securities you hold of mine to secure the payment of the sum of 300*l.* as mentioned in the said promissory note . . . the said sum of 300*l.* and all other moneys to bear interest at the rate of one shilling in the pound per month from the day when the same becomes due. The power of sale conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, shall apply to this security." The Schedule referred to comprised: "All my right, title, interest, estate, claim and demand whatsoever in and under the will of my great grandfather, the late Lewis Edwards of Newport, Mon., and in and under any other will or settlement

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whereby I benefit." Isaiah Blaiberg died on October 27, 1914.

F. J. E. Gething was adjudicated bankrupt on February 5, 1897, no payment of interest having then been made and no acknowledgment given by him in respect of either mortgage. The Official Receiver, his trustee in bankruptcy, thereafter gave no acknowledgment and made no payment on account.

The trustees of the testator's will had notice of the two mortgages, and on February 4, 1935, Messrs. Davis, Lloyds & Wilson, their solicitors, sent to Joseph Blaiberg, the executor of Isaiah Blaiberg, the estate accounts and distribution statement prepared on their instructions, together with a letter in the following terms: "Referring to our previous correspondence with you, we now enclose herewith the estate accounts in this matter together with the distribution statement of Mr. F. J. E. Gething's share. The first three pages of the account lead up to the balance sheet at the bottom of the last page of the accounts. There you will see that there is due to Mr. F. J. E. Gething's share the sum of 700*l.* 6*s.* 6*d.* This figure is carried to the top of the distribution statement attached to the accounts. Item 'A' in the statement shows the repayment of a loan made by the late Mr. J. E. Gething to Mr. F. J. E. Gething. Item 'B' shows the repayment to Mr. Isaiah Blaiberg of 292*l.* 19*s.* 6*d.*" The estate accounts and the distribution statement were also sent to the trustees of the will of J. E. Gething. The share of F. J. E. Gething was now represented by a sum of money on deposit at the Midland Bank.

On September 21, 1936, the trustees of the testator's will took out a summons to determine (*inter alia*) (1.) whether and to what extent the debts secured by the mortgages were barred by any statute of limitations and (2.) what proportion of the moneys representing the share in question was payable to the trustee in bankruptcy and what proportion to the respective mortgagees.

Timins for the plaintiffs.

W. F. Waite for the trustees of J. E. Gething. Though more than twelve years have elapsed since the mortgage moneys

became payable, the sending of the estate accounts and the distribution statement to the mortgagees amounted to an acknowledgment within s. 8 of the Act and the mortgage moneys are, therefore, recoverable. For the purpose of making the acknowledgment, the trustees of the will were the agents for the mortgagor: *Toft v. Stephenson*. (1) In *Bradshaw v. Widdrington* (2) it was held that the payment of interest by a person who as between himself and the mortgagor was bound to pay it, though he was under no contract with the mortgagee to do so, was a payment within the section. In that decision "bound" should be read as "bound or entitled." In this case the trustees of the will had notice of the mortgages and were under a duty to make a proper division as between the beneficiaries and the chargees. They could not without risk have paid the money over to the mortgagor without regard to the rights of the mortgagees.

C. V. Rawlence for the executor of Isaiah Blaiberg. The trustees of the will in sending the mortgagees the estate accounts and the distribution statement were acting as the agents of the mortgagor within the meaning of s. 8 of the Act. This case is covered by decision in *Toft v. Stephenson*. (3) In that case where the liability to pay the purchase-money on certain land was in question a letter written by the attorney of the trustees of the deceased purchaser to the assignees of the vendors was held to be an acknowledgment sufficient within the meaning of s. 40 of the Real Property Limitation Act, 1833, to withdraw the case from its operation and for that purpose to bind the cestui que trustent, Lord Cranworth L.J. said: "It is an acknowledgment in writing of the right to the money in question, signed by the agent of the persons by whom it was payable, and given to the agent of the person entitled thereto, and so within the express words of the clause."

L. W. Byrne for the Official Receiver. The present case is indistinguishable from *In re Jauncey*. *Bird v. Arnold* (4), where in similar circumstances it was held that the mortgagee's

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(1) (1851) 1 De G. M. & G. 28.

(2) [1902] 2 Ch. 430.

(3) 1 De G. M. & G. 28, 40.

(4) [1926] Ch. 471.

FARWELL J. right against such part of the fund as consisted of the proceeds of the sale of land was barred by s. 8 of the Real Property Limitation Act, 1874, but that he was entitled to enforce his security against so much of the mortgagor's interest in the fund as consisted of personality.

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There has been no acknowledgment within the meaning of the section. The sending of the estate accounts and the distribution statement was not sufficient for that purpose. Moreover, the trustees of the will were not the agents of the mortgagor. *Toft v. Stephenson* (1) throws no light on this point because in that case the persons giving the acknowledgment were in fact the agents of the persons liable. In *Bradshaw v. Widdrington* (2) the circumstances were entirely different. The solicitor in that case was beyond a doubt acting for the mortgagor. Buckley J. said that the person whose payment or acknowledgment was material for the purposes of the statute was the person bound as between himself and the mortgagor to pay the debt. In the present case the trustees were not so bound and, therefore, could not give an acknowledgment on the part of the beneficiary.

FARWELL J. [having stated the facts:] So far as the mortgaged property consisted of pure personalty no statute affects the rights of the mortgagee, but the first of the two mortgages was a mortgage of land only, and, therefore, the remedy of the mortgagee is wholly barred unless it is saved by the latter part of s. 8 of the Real Property Limitation Act, 1874, which is as follows: " . . . unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent." It is these last words which give rise to the question, which I have to decide—namely, whether the communications sent on behalf of the trustees of the testator's will were acknowledgments of the right of the mortgagees given by the person by whom the

(1) 1 De G. M. & G. 28.

(2) [1902] 2 Ch. 430, 439.

debt was payable or his agent within the section. Two decisions are said to establish that these documents do amount to an acknowledgment. The first of these is *Toft v. Stephenson* (1), but in my judgment that does not assist the mortgagees. It is quite a different case from the present one, because there the acknowledgment was given by persons who were in fact agents of the persons liable to pay, and the mere fact that they were trustees did not prevent their being agents, whereas in the present case neither of the acknowledgments relied on was made by the person by whom the sum was payable or his agent.

The other case referred to was *Bradshaw v. Widdrington*. (2) In that case it was held that the acknowledgment required by the statute must be an acknowledgment either by the mortgagor himself or by some person bound as between himself and the mortgagor to pay the debt. Having regard to that decision, I must consider whether there has been in this case an acknowledgment made by "a person bound as between himself and the mortgagor" to pay. It was suggested that "bound" should be read as "bound or entitled". I do not think that I can so read it, but even if it be so read I cannot treat the acknowledgment in this case as coming within the definition. The trustees had notice of these two charges and when they came to distribute the estate it was their duty to see that payment was made to the persons entitled and they might have run some risk if they had paid over the money to the mortgagor disregarding the mortgagees, but that does not mean that as between the mortgagor and themselves the trustees were bound to pay the mortgagees. An acknowledgment to the mortgagees by the trustees in this case was not an acknowledgment by the person by whom the debt was payable or his agent. I cannot treat the trustees as agents for the mortgagor to make these payments, and it follows that they are not persons who can give an acknowledgment within the section so as to protect the mortgagees. The recovery of the debt secured by the first mortgage is, therefore, barred inasmuch as it was a mortgage of land.

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(2) [1902] 2 Ch. 430.

FARWELL J. As to the other mortgage so far as it comprised land at the date of the mortgage that also is statute barred. So far as the mortgage was one of pure personalty there is no statute preventing recovery by the mortgagee, and I shall therefore direct an inquiry of what the property included in that mortgage consisted at the date of the mortgage and what now represents the personal property and the land respectively then included in the mortgage.

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Solicitors : *Kinch & Richardson, for Davis, Lloyds & Wilson, Newport, Mon.; Harold Blaiberg; Tarry, Sherlock & King.*

F. H. C.

In re WARWICK'S SETTLEMENT TRUSTS.FARWELL
J.GREVILLE TRUST COMPANY *v.* GREY.1937
April 22,
23, 28.

[1936. W. 1647.]

Settled land—Tenant for life—Assignment of life tenancy—Deficiency of income to meet jointure and interest on portions—Payment in full by assignee—Whether assignee entitled to recoupment out of corpus.

The tenant for life of certain settled estates charged with a jointure and portions, together with interest on the portions, sold his equitable life interest to an unlimited company which thereby became entitled to receive the rents and profits of the property, subject to discharging thereout all outgoings and outstanding liabilities. In three successive years the rents and profits received were insufficient to pay in full the jointure and the interest on the portions, and the company voluntarily and without any arrangement with or notice to other persons interested in the estates made up the deficiency :—

Held, (1.) that the jointure and the interest on portions were a continuing charge on the settled estates ;

(2.) that during the lifetime of the tenant for life, or so long as the settled estates remained unsold, it could not be shown that when the final account of the life tenancy was taken there would be a deficiency in the total rents and profits ;

(3.) that, accordingly, during that period no claim for recoupment of a deficiency in one or more years could be sustained.

Kensington v. Bouverie (1859) 7 H. L. C. 557 considered.

ADJOURNED SUMMONS.

On April 28, 1909, Lord Brooke, afterwards sixth Earl of Warwick, being then entitled absolutely in reversion expectant on the death of the fifth Earl of Warwick to Warwick Castle and divers freehold lands and hereditaments known as the Warwick Settled Estates, and to certain moneys and investments liable to be laid out in the purchase of lands to be enjoyed with those estates, made a settlement in consideration of his marriage with Miss Eden.

By the settlement he charged all his estate and interest in the property first, with an annual sum of 500*l.* as pin money for Miss Eden and secondly with the following charge—" if Miss Eden shall survive Lord Brooke then thenceforth during

FARWELL the rest of her life with the payment to her or her assigns
 J. for her separate use of the rent charge or yearly sum
 1937 following that is to say as from the death of the
 WARWICK'S SURVIVOR of the Earl of Warwick and Lord Brooke the
 SETTLEMENT yearly sum of 2000*l.* and further as from the death of
 TRUSTS, the survivor of the Earl of Warwick and Lord Brooke if at
In re. the time of the death of Lord Brooke there shall be living
 GREVILLE a son of the said intended marriage or a son of such a son an
 TRUST CO. additional yearly sum of 1000*l.* (making with the said annual
v. sum of 2000*l.* a total of 3000*l.*) every such yearly sum as
 GREY. aforesaid together with interest as hereinafter mentioned
 — to be charged upon and issuing out of all the said castle, lands,
 estate, moneys, investments and premises and to be considered
 as accruing from day to day but to be payable quarterly on the
 usual quarter days without any deduction except for income
 tax and free from all death duties and so that every
 payment shall carry interest as from the expiration of a
 quarter after the quarter day on which the same is due at
 4 per cent. per annum." This jointure was secured by the
 grant of a term of 500 years.

Subject to these charges Lord Brooke further charged his
 interest in the property "with the payment to the child or
 children of him Lord Brooke by Miss Eden (other than a son
 who is excepted as hereinafter provided) or the issue of any
 such child or children to be born and take vested interests
 within limits allowed by law of the different sums hereinafter
 mentioned (according to the events hereinafter specified) that
 is to say, if there shall be but one child, the sum of 10,000*l.*, if
 there shall be only two such children, the sum of 15,000*l.*, and
 if there shall be three or more such children, the sum of 20,000*l.*,
 free from death duties, such sum to be an interest vested in
 such child or children other than as aforesaid or his, her or
 their issue or such one or more exclusively of the others or other
 of such children or issue, at such age or times or respective
 ages or times, if more than one, in such shares and with such
 future or other trusts for the benefit of any child or children or
 issue, upon such conditions with such restrictions and in such
 manner as Lord Brooke and Miss Eden shall by any deed or

deeds, revocable or irrevocable jointly appoint, and in default of and subject to any such appointment as the survivor of them, Lord Brooke and Miss Eden, shall in like manner or by will or codicil appoint, and in default of and subject to any such appointment to belong to any such child or children other than as aforesaid, who being male shall attain the age of 21 years, or being female shall attain that age or marry, and if more than one, in equal shares as tenants in common, but not to be raisable or payable during the life of Lord Brooke without his consent in writing, and also doth hereby charge all the said premises hereinbefore charged with the said portion moneys as aforesaid but, subject and without prejudice as aforesaid, with such annual sum of money as shall be equal to interest at the rate of 4 per cent. per annum." Payment of these portions was secured by the grant of a term of 2000 years. It was provided that a son of Lord Brooke and Miss Eden who upon the death of Lord Brooke should become entitled to any real or personal estate producing a net rental or income not being less than 5000*l.* a year, and the issue of such a son, should be excepted from the children and issue for whom portions were provided.

On February 11, 1924, the settlor, having succeeded to the earldom on the death of the fifth earl, made his will. By cl. 5 he bequeathed to trustees all freehold or copyhold hereditaments belonging to him, the clause proceeding: "And I direct that during the period (hereinafter called 'the appointed period') from my death until the expiration of twenty years after the death of the survivor of the issue living at my death of my late grandfather, the Right Honourable George Grey, fourth Earl of Warwick and the issue living at my death of His late Majesty, King Edward VII., my trustees shall hold the settled hereditaments in trust for the person who shall for the time being be the Earl of Warwick in each case during his life (without impeachment for waste) within the appointed period, and that after the expiration of the appointed period my trustees shall hold the settled hereditaments in trust for the person (if any) who shall at such expiration be the Earl of Warwick in tail male, but subject to the provisions of clause 9."

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FARWELL J. Clause 9 provided: "It shall be lawful for any Earl of Warwick for the time being of full age jointly with the trustees for the time being of this my will (being not less than two in number or being a corporation) at any time or times within the appointed period, by any deed or deeds, revocable or irrevocable wholly or partially to revoke the trusts, powers and provisions hereinbefore declared and concerning the whole or any part or parts of the said hereditaments."

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By a codicil dated December 16, 1925, the testator bequeathed "to my wife during her life an annuity of such amount as together with the aggregate yearly sum of 3000*l.* secured to her by my marriage settlement will make up the net yearly amount of 3000*l.*, free from income tax and super tax and from all death duties," the hereditaments devised by clause 5 of his will being charged with payment thereof.

The sixth Earl of Warwick died on January 31, 1928, his eldest son born on March 4, 1911, becoming seventh Earl. There being two other children of the marriage, the Hon. Richard Greville, born on July 4, 1913, and the Hon. John Greville, born on February 2, 1918, a sum of 15,000*l.* for portions for them was charged on the settled estates, and no appointment having been made, they were entitled in equal shares.

On April 1, 1932, being then of full age, the seventh Earl of Warwick entered into an agreement with the Greville Trust Co., an unlimited company, whereby he agreed to sell them his equitable life interest under the will, subject to all incumbrances, in consideration of the sum of 12,500*l.*, to be paid and satisfied by the payment to him during the residue of his life of an annuity of 700*l.* Clause 4 of the agreement provided: "The purchase shall be completed on April 1, 1932 (herein referred to as 'the completion date') on which date the company shall be entitled to enter into possession and receipt of the rents and profits and subject to the consent of the insurance offices, to the benefit of the insurances on the property hereby agreed to be sold and shall from the same date discharge all outgoing and outstanding liabilities in respect thereof. . . ."

The company, having gone into possession of the rents and

profits, in each of the years ending March 31, 1933, 1934 and 1935, the actual amounts received by them in respect of those rents and profits were not sufficient to pay in full the jointure and the interest on portions charged on the estates. They accordingly paid the deficiency out of other moneys belonging to them, these payments being made voluntarily and without any arrangement with or notice to other persons interested in the estates.

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The company now took out this summons to obtain a declaration that they were entitled to be recouped out of the capital or corpus of the property charged by the settlement to the extent to which the jointure and interest on portions, through insufficiency of income, was paid by them out of their own moneys, and a declaration that they would be entitled to a like recoupment for the year ending March 31, 1936, and future years.

Radcliffe K.C. and *A. Guest Mathews* for the Greville Trust Co. During the years in question there was a deficiency of income so that the rents and profits received by the company were not sufficient to meet the payments charged on the settled property. The company have made up this deficiency out of other moneys belonging to them and so have relieved capital. They are, therefore, entitled to be subrogated and to have a charge to recoup themselves out of the corpus of the settled property. Their position is similar to that of a tenant for life who pays off a capital charge on an estate out of his own pocket, and who is *prima facie* entitled to keep it alive for his own protection. It was recognized by the House of Lords in *Kensington v. Bouverie* (1) that if a tenant for life in possession of an estate subject to a charge bearing interest pays the interest, although the rents and profits are insufficient, he may make himself an incumbrancer, for the excess of his payments beyond the amount of the rents and profits. The views there expressed exactly cover the present case. Further, the sums here charged are payable quarterly and it is not until some time after they fall due that the company can ascertain what is the actual income

(1) 7 H. L. C. 557, 572, 589, 592, 594.

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of the settled estates and whether there will be a surplus or a deficiency. Thus, if it were held that there was no right to recoupment they would be obliged either to refuse payment until the amount of the income was known or to make the payments at the risk of being out of pocket. These sums are not a continuing charge.

Fergus Morton K.C. and *L. W. Byrne* for the persons interested under the settlement. The case of *Kensington v. Bouverie* (1) is no authority for the proposition that the plaintiffs are entitled to recoupment. The circumstances were quite different in that (1.) the claim was not being made by an assignee; (2.) it was made after the determination of the life interest; and (3.) at all material times the remainderman was a person in existence and known. In the present case the payment of the jointure and the interest on portions beyond the amount of the rents and profits received is not on the same footing as the payment off by a tenant for life of a capital charge. The company was under no duty to make these payments beyond the income of the settled estates received by them, or receivable with good management, and they should have left the chargees to take such remedies as were open to them against the corpus. This case is analogous to the payment of premiums on an insurance policy by a stranger: *In re Leslie*. *Leslie v. French* (2); *In re Earl of Winchilsea's Policy Trusts*. (3) The company in paying this deficiency should be taken to have waived any right they might have to a charge on the estate, inasmuch as by so doing they obtained the benefit of remaining in undisturbed possession of the settled estates continuing their course of management without the accumulation of arrears: *Kensington v. Bouverie*. (4) In that case Lord Campbell L.C. (5) drew attention to the "alarming inconveniences" which would arise if in such circumstances a tenant for life were "to be considered as silently making himself an incumbrancer on the estate for any excess, large or small, of the payments for interest above the rents and profits." That is what the plaintiffs

(1) 7 H. L. C. 557.

(2) (1883) 23 Ch. D. 552.

(3) (1888) 39 Ch. D. 168.

(4) 7 H. L. C. 557, 574.

(5) *Ibid.* 575.

have been attempting to do in this case during the years when there was a deficiency. If they intended that the surplus should be a charge on the estate they should have made some declaration or done some act demonstrating that intention : *Kensington v. Bouverie*. (1) But these payments are a continuing charge on the income which during the lifetime of the tenant for life is the primary fund for satisfying these charges : *Honywood v. Honynwood* (2) ; *In re Croxon. Ferrers v. Croxton*. (3) If the plaintiffs were entitled to be recouped in every year in which there was a deficiency, the effect would be that they would be able to put in their pockets any surplus income in future years since there could not be a corresponding recoupment of capital.

Danckwerts, for the trustees of the will, adopted this argument.

G. P. Slade, for the Earl of Warwick, adopted it likewise.

A. Guest Mathews in reply.

FARWELL J. [having stated the facts :] The question how far the company is entitled, if at all, to any such declaration as is claimed is one which, so far as I know, is not covered exactly by authority. The plaintiff company relies, and I think the whole of its case is based, upon *Kensington v. Bouverie* (4), a decision of the House of Lords. It will be necessary to consider how far that authority supports this application, and whether the company is entitled, having regard to it, to any such charge as is claimed ; but that case differs materially from the case with which I am dealing, and it is impossible to say that it is an authority which is exactly in point. There are three obvious differences. Firstly, in that case the payments which were made, in respect of which recoupment was claimed, were made by a person who was the tenant for life and not, as in this case, the assignee of the rents and profits of the estate ; secondly, the claim for recoupment was made after the cessor of the life interest, the claim being a claim by the legal personal representative of the deceased tenant for

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(1) 7 H. L. C. 557, 595.

(2) [1902] 1 Ch. 347.

(3) [1915] 2 Ch. 290.

(4) 7 H. L. C. 557.

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life ; thirdly, in that case the remainderman was a person in existence who was known, whereas in this case who may ultimately become entitled to the estate as tenant in tail is not known and cannot be known for many years. That authority, however, does assist the plaintiff to this extent, that all the learned Lords who were parties to that decision appeared to recognize that there might be a right to recoupment in certain circumstances in the tenant for life or his legal personal representative in respect of interest on mortgages which the tenant for life had paid out of his own resources. To that extent that decision assists the plaintiffs ; but the question which I have to determine requires consideration from a rather wider aspect and I propose in the first instance to consider it apart from any difficulty which may arise owing to the fact that the plaintiff company is not the tenant for life. I will, so far as it is necessary, deal with that matter a little later, but for the moment I am going to consider this matter disregarding that factor, and as though the plaintiff company was strictly speaking tenant for life.

It is well settled that, where a tenant for life pays off a capital charge on the estates out of his own moneys, he is entitled *prima facie* to keep that charge alive for his own protection, but I have found no case which in terms explains the principle upon which that rule rests. Generally speaking where a person out of his own moneys voluntarily chooses to pay off a charge on the property of another without taking an assignment of the charge, the charge goes, and the person making the payment has no claim against the estate or against the owner of the estate. What is sometimes called the right of subrogation is a right which is extremely limited in its application. There are rights of subrogation at common law in respect of insurance. There are rights in equity of subrogation in cases of sureties and in some cases of trustees, and there may be other cases ; but the right is a limited one, and it may be useful to consider how the right of recoupment in a tenant for life, who pays off a capital charge, arose. In my judgment it is clearly an equitable and not a legal right, and I think that it originated in the Court of Equity, when

administering an estate, coming to the conclusion that as both the tenant for life and the person entitled in remainder had some interest in the estates as a whole, if the tenant for life paid off a charge on the whole estate out of his own moneys, it was inequitable to permit the remainderman to have the benefit of such a payment, and in order to do equity between the parties the Court held that the tenant for life in those circumstances was *prima facie* entitled to stand in the shoes of the mortgagees or chargees. However that may be, it is now well settled there is an equity in favour of the tenant for life to be recouped moneys which he has paid to discharge a capital charge on the estates, and one which, *prima facie*, he is entitled to enforce. In such a case the onus rests on those who say that by such payment the tenant for life did not intend to keep the charge alive, and in the absence of any satisfactory evidence to the contrary, the tenant for life is entitled to be recouped. Whether such an equitable right exists in a tenant for life to recover interest paid out of his own moneys on such charges is a question which, so far as I know, has never been exactly decided, but having regard to the case to which I have already referred, *Kensington v. Bouverie* (1), it is difficult to say that there can never be any such equity in his favour because, although the learned Law Lords differed as to whether or not in the particular circumstances of that case the equity could be successfully asserted by the legal personal representative of the tenant for life, they all appear to have recognized that there might be such an equity, and that in certain circumstances a claim for recoupment could be successfully asserted.

But that case deals only with the claim of a tenant for life or his legal personal representative to recoupment of interest so paid after the determination of the life interest. Other considerations must necessarily apply when the Court is dealing with the equity of a tenant for life to a charge or a declaration of charge in respect of interest during the continuation of the life interest. It is clear from the decision in the House of Lords that in order successfully to assert an equity in the tenant for life to be recouped for payment out of his own

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moneys of interest charges, it is necessary firstly, for the claimant to show that there has actually been payment out of his own moneys; secondly, he must show not merely what the actual amounts were that he paid and received, but he may have to satisfy the Court that the sums which he has paid out are more than the sums which he ought to have received had the estate been properly managed. If it could be shown that there had been mismanagement or misuser of the property so that the income received was less than the income which could have been received, given good management, that authority appears to show that if the income which could have been received would have been sufficient to satisfy the interest, no such equity would exist. Further, it is for the tenant for life or his legal personal representatives to show that there is nothing inequitable in the particular facts of the case in his setting up such a claim. In the case in the House of Lords, the majority of the House held that the equity could not be successfully asserted because the payments had been made by the tenant for life without communication or notice to the remainderman, and the majority of the Court seems to have thought that it was not equitable that the tenant for life should assert such a claim if he had not given the remainderman an opportunity to object, if he so desired, to such payments being made.

It is, I think, obvious from that authority that, when a tenant for life or his legal personal representative is asserting an equity in his favour with respect to payment of interest, his position is one of much greater difficulty than where a tenant for life is asserting his equity to the benefit of a charge on the estates which he has himself discharged out of his own money, and when one considers the circumstances, the difficulty of the claim in this case must be apparent. The interest on the portions and the jointure are continuing charges upon income as well as upon capital and it therefore appears to me to be quite impossible for a tenant for life, while alive, or at any rate so long as the properties remain unsold, to show that there is, or rather will be, a deficiency in the total of the rents and profits. It is not, in my judgment right to say that

because there has been a deficiency in one or two or more years, there will necessarily be a deficiency when the whole account comes to be taken. It may well be that when the whole amount received, or which ought to have been received during the tenancy for life, is calculated against the sums paid for interest over the same period, it will then appear that there had been sufficient, notwithstanding that in some years the income had been insufficient, and a claim by the tenant for life for a charge or declaration of charge, because in one year or in more than one year, there was a deficiency which he chose to pay out of his own pocket, seems to me to be a claim which this Court cannot sustain. As I have said there may or may not be a right to recoupment at the end of the period, but there can be no present right to a charge. Presumably if the tenant for life was entitled to a charge he would be entitled to interest on the charge, and possibly compound interest, so that having the benefit of that charge he would still remain in possession of the income in the future years, which income might in the years to come be more than sufficient to pay the whole of the interest and leave a surplus in hand for the tenant for life.

In those circumstances it seems to me that even in the case of a tenant for life it is impossible for him to claim, during his lifetime, that he has a right to be recouped then, or at some other time, money which he has chosen to pay out of his own pocket for interest on the charges. It may be that it suits his own purpose to make these payments, but there is no obligation upon him to make them, and if he elects to do so, he does it, in my judgment, at his own risk. When the tenancy for life comes to an end, or possibly if and when the estates are sold, and the proceeds of sale invested in securities, the position is different. But until then there can be no means by which the question, whether or not there is a right to recoupment, can properly arise, or properly be determined. While I am not denying that there may ultimately be some right to recoupment, and that when the due time comes, a tenant for life or his legal personal representatives may be entitled, having regard to the decision in the House of Lords, to assert an

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equity in his favour for recoupment of moneys paid for interest, until that event happens, in my judgment he is not entitled to any such relief. This Court will not make a declaration that there may be a charge in the future, but it will leave the tenant for life to see, or rather it may be for his legal personal representatives to see whether such an equitable right can be successfully asserted after the determination of the tenancy for life.

In those circumstances, it appears to me that this application, for the reasons I have given, is misconceived and must be dismissed with costs; but before I leave the matter I think it would be right to say this. The question whether the company may ultimately be able to assert successfully a claim for recoupment is a future and a hypothetical question. It is a future question because it cannot be determined until the death of the tenant for life, or as I said, possibly until the sale of the estate. It is a hypothetical question because it may never arise at all, since there may not be any deficiency when the accounts ultimately come to be taken. Therefore, it is not a question I ought to decide now or upon which I ought to express any decided opinion, but I think it would be right to say this, that if there be an equity such as I have mentioned in favour of the tenant for life, I myself am unable to see why such an equity could not be successfully asserted by an assignee of the rents and profits. If the reason for the equity in favour of the tenant for life is that the tenant for life and the remainderman are both interested in the property as a whole, and the Court considers it inequitable that the reversioner should have the benefit at the expense of the tenant for life of the discharge of an incumbrance on the estates, I myself fail to appreciate why a similar equity cannot be asserted by an assignee of the tenancy for life. I am not finally deciding it, but that is my present view on that matter.

The other matter which I desire to mention is this. The other distinction between the case in the House of Lords and this case is, that in the House of Lords case there was a reversioner who was alive to whom notice could have been given. In the present case there is no such person, but the trustees represent to some extent the persons entitled to the

ultimate reversion. I should hesitate to say that notice to the trustees would not be sufficient to prevent the Court ultimately holding that the equity could not be asserted in favour of the tenant for life, because of failure to give notice, as was the position in the case in the House of Lords, but as I have said those are not really matters with which I am concerned to-day. If, when the final account of the life tenancy can be taken, it can then be shown that, given proper management of the estate and allowing for that, there was not sufficient income to pay the whole of the interest on the charges, then and only then in my judgment can the plaintiff company make the claim to be recouped which it is seeking to make to-day. Whether that claim will succeed or not will depend upon the circumstances at the time and the equities existing as between the tenant for life and the persons entitled in remainder in the particular circumstances of the case as it then appears. So far as this summons is concerned, in my judgment it is misconceived and must be dismissed with costs.

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Solicitors: *Frere, Cholmeley & Co.; Tarry, Sherlock & King; May, May & Deacon.*

F. H. C.

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In re PILKINGTON'S WILL TRUSTS.

¹⁹³⁷
May 7.

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[1936. P. 2575.]

Will—Settlement of trust fund—Life interest to determine if charged—Tenant for life domiciled in England—Assignment of his property for benefit of creditors signed in Scotland—No registration in accordance with English law—Whether charge effected determining life interest—Deeds of Arrangement Act, 1914 (4 & 5 Geo. 5, c. 47), s. 2.

By the Deeds of Arrangement Act, 1914, s. 2: "A deed of arrangement shall be void unless it is registered with the Registrar of Bills of Sale under this Act within seven clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England, if posted within one week after the execution thereof, and unless it bears such ordinary and ad valorem stamp as is provided by this Act."

A testator, who died in 1932, bequeathed his residuary estate to trustees in trust to pay the income thereof to his wife F. P. for life, and after her death to raise thereout a fund the income of which, in the events which happened, they were directed to pay to F. H. during his life, "if at the time of this present trust taking effect in possession no act or event shall have happened whereby the life interest . . . if belonging to him absolutely, would have become vested in or charged in favour of some other persons or person" A discretionary trust in favour of F. H. his wife and issue was created in the event of failure of the trust during his life. In 1933 F. H., being temporarily resident in Scotland, though domiciled in England, executed a deed assigning to a trustee for the benefit of his creditors "my whole means and estate, heritable and moveable, real and personal, wherever situated, now pertaining and belonging or due and indebted to me or over which I may have any power of disposal or to which I may succeed during the subsistence of this trust." This deed was never registered in accordance with the Deeds of Arrangement Act, 1914, s. 2. F. P. died in 1936:—

Held, (1.) that the terms of the deed were wide enough to cover the interest of F. H. under the will; (2.) that, inasmuch as on the true construction of the deed the law intended to be applied in dealing with it was the law of Scotland, which did not require registration, it was not void for want of registration in accordance with the Deeds of Arrangement Act, 1914; (3.) that, accordingly, there had been forfeiture of the life interest of F. H. and the discretionary trust came into force.

ADJOURNED SUMMONS.

The testator, Claude Pilkington, who died on January 4, 1932, by his will dated January 8, 1920, bequeathed his residuary estate to trustees in trust to pay the income thereof to his wife, Frances Pilkington, for her life or during her widowhood, and on her death to raise out of the trust fund a fund of 10,000*l.*, referred to as the "Charles Harrison Fund," for the benefit of his wife's nephew, Francis Charles Harrison. By clause 12 of his will he directed them to hold this fund upon trust "if at the time of this present trust taking effect in possession no act or event shall have happened whereby the life interest hereby given to my wife's nephew, the said Francis Charles Harrison, in the Charles Harrison Fund, or any part thereof, if belonging to him absolutely, would have become vested in or charged in favour of some other persons or person or corporation, then to pay the income of the said Charles Harrison Fund to the said Francis Charles Harrison during his life or until some such act or event as aforesaid shall happen . . . and in the event of the failure or determination during the life of the said Francis Charles Harrison of the trust lastly declared in his favour, the trustees or trustee shall during the remainder of his life pay or apply all or any part of the said income unto and for the personal support, maintenance and benefit of the said Francis Charles Harrison and his wife and issue (if any) for the time being in existence and the person or persons for the time being interested in the Charles Harrison Fund under the ulterior trusts hereinafter declared, or any of such respective objects of the present discretionary trust to the exclusion of the others or other of them in such shares and manner as the trustees or trustee shall from time to time in their absolute discretion think proper, and subject to such discretionary trust or power shall hold the said income upon the trusts upon which the same would for the time being be held if the said Francis Charles Harrison were dead."

On March 15, 1933, Francis Charles Harrison, who was domiciled in England, but was temporarily resident in Scotland, signed a deed at Jedburgh for the benefit of his creditors

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FARWELL in the following terms : “ I, Francis Charles Harrison, Lieutenant Commander, Royal Navy, retired, presently residing at Darnlee, Melrose, considering that my affairs have become embarrassed, do hereby dispoⁿe, assign and convey to Charles John Munro, chartered accountant in Edinburgh, as trustee for behoof of my whole creditors at the date hereof, and who shall accede hereto, and to his assignees, my whole means and estate, heritable and moveable, real and personal wherever situated now pertaining and belonging or due and indebted to me or over which I may have any power of disposal or to which I may succeed during the subsistence of this trust, together with the writs, vouchers and instructions thereof, dispensing with the generality hereof and declaring that these presents shall be as effectual as if every particular of my means and estate were herein specially enumerated ; substituting the said Charles John Munro as trustee aforesaid in my full right with power to him to take immediate possession of my estates, and without any advice of me or my creditors to carry on for such periods as he may think fit, any business in which I may be engaged, and to sell my whole estates or any part thereof by public or private sale in whole or in lots, and on such conditions and at such prices as he shall think fit ; to sue for and recover the debts due to me ; and in general to do everything necessary for the recovery and realisation of my means and estate ; to re-let the premises occupied by me, at such rent as he may think proper or keep them in his own hands, to renounce and discharge any leases or right of possession, with power to borrow money on the security of my said estates, or any part or portion thereof, and with power to the said trustee to compound and compromise claims and also to submit and refer any questions or differences that may arise between him and any other person or persons ; and also with power to my trustee to sue, insist in, and defend all actions, and in general every other thing to do which I could have done before granting hereof : declaring that purchasers from my said trustee and all others transacting with him, shall not be concerned with the application of the

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sums payable by them, or with anything herein contained, but the simple receipt of my trustee shall be a complete discharge. And I bind myself and my heirs, executors and successors to execute and deliver all writs and deeds necessary for vesting in the said trustee and his assignees the whole estates hereby conveyed. And I hereby provide and declare that the said trustee shall have all the powers and privileges of trustees in sequestrations under the Bankruptcy (Scotland) Act, 1913. . . . But these presents are granted only in trust for the following purposes, namely: First. The said trustee shall apply the proceeds of the said estate and effects, in payment of the expenses hereof, and of realising and recovering the said estate and effects, and in general the whole expenses that may be incurred, or are already incurred, in relation to this trust, or to the management or execution hereof, including a remuneration for his own trouble as the same may be fixed and determined by a committee of the creditors duly appointed in terms of section 185 of the Bankruptcy (Scotland) Act, 1913, failing which by the accountant of Court in terms of said section which committee, or failing them, the accountant of Court shall audit the accounts of the intromissions of the trustee, and ascertain and declare the balance available for division and distribution among the various classes of creditors, preferable and ordinary, it being, however, provided that it shall be in my power at any time during the proceedings of said trustee to settle with my said creditors by composition or otherwise." This document was never registered with the Registrar of Bills of Sale in accordance with the Deeds of Arrangement Act, 1914, s. 2.

The testator's widow having died on July 12, 1936, this summons was taken out by the trustees of his will to determine (inter alia) whether or not, by reason of the deed of arrangement, the life interest of Francis Charles Harrison in the fund had failed and the discretionary trust had come into operation.

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F. Farrer for the plaintiffs.

A. Guest Mathews for Francis Charles Harrison. There has

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been no forfeiture of the life interest. The words of the deed were not such as to include it. It cannot be maintained that by the use of general words such as those there employed the tenant for life intended to pass to the trustee for the benefit of his creditors an interest which by reason of that very act would immediately pass to some one else and which could not in fact benefit them. The decision in *In re Waley's Trusts* (1) governs this case. But even if it be held that the words of the deed cover the life interest, no forfeiture can arise because the document itself is void. It is a deed of arrangement within the Deeds of Arrangement Act, 1914, and the requirements of s. 2 have not been complied with. It is immaterial that the deed was executed in Scotland. The proper forum for the determination of its validity is England, the tenant for life being a domiciled Englishman: *Dulaney v. Merry & Son*. (2)

R. W. Goff for the trustee of the deed of arrangement. The creditors are not interested in the question whether or not a forfeiture has occurred since they cannot benefit in either case.

Gerald Upjohn for the Bank of New South Wales, mortgagees of certain chattels.

Watmough for the wife and children of Francis Charles Harrison. Forfeiture has been occasioned by this document and the discretionary trust has come into operation. On the face of it the deed of arrangement is wide enough to cover this interest. The decision in *In re Waley's Trusts* (1) was arrived at on the construction of altogether different words and is not binding in this case. If it were held to be of universal application, no forfeiture could ever occur unless the interest in question were specifically mentioned in the document creating the charge. Further, the assignment was not invalidated by the Deeds of Arrangement Act, 1914. It was valid according to the *lex loci actus* since the law of Scotland had no such requirements as to registration. It is clear from its terms that it was intended to operate according to the law of Scotland. The Act of 1914 did not apply to the tenant

(1) (1855) 3 Drew. 165.

(2) [1901] 1 K. B. 536.

for life. The way in which the Act is framed indicates that its scope is limited to debtors subject to the English bankruptcy laws. There is nothing in this case to show that the tenant for life was so subject : *In re Debtors* (No. 836 of 1935). (1)

Ungoed-Thomas for Sir Thomas Pilkington, Bt., interested as an object of the discretionary power. Apart from the Deeds of Arrangement Act, 1914, there could be no doubt that this assignment would be perfectly valid. The whole matter depends on the scope of s. 2. This deed, being intended to operate according to the law of Scotland, was not subject to the requirements of the Act. It is conceivable that an assignment designed to operate in accordance with foreign law might be subject to obligations abroad which made it impossible to comply with this Act as well. The deed is valid and there has been a forfeiture.

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FARWELL J. [having stated the facts :] It has been argued that as a matter of construction the assignment does not operate to create a forfeiture. The case upon which that argument is based is a decision of Kindersley V.-C. in *In re Waley's Trusts*. (2) The side-note stated the facts as follows : " Under a will F. S. was entitled on the death of A. to a certain share of a fund. By deed made by him, living the tenant for life, he assigned stock-in-trade, scheduled, and all his real and personal estate, using very general language, to a trustee, to sell for the payment of his creditors. No creditors were parties, but some were paid under it. Afterwards the trustee sold the residue. The will contained a clause that, on any legatee becoming bankrupt, or mortgaging or selling or anticipating his share, or compounding with his creditors, his share should go over." The terms of the deed were wide. They were : " all the stock-in-trade, goods, wares, merchandize, pictures, paintings and property of him Frederick Salamonson then remaining at 21 New Street, New York ; and all notes, accounts, debts, choses in action, property and estate of him the said Frederick Salamonson, both real and personal, in law or equity, of which he was possessed or to

(1) [1936] Ch. 622.

(2) 3 Drew. 165.

FARWELL J. which he was entitled, except such articles of property as by law were exempt from execution." Then there was a direction for making of an inventory and a trust to sell for the payment of the creditors. The learned Vice-Chancellor held that the document was not a deed of composition, and that therefore it did not create a forfeiture under the will which provided that if a legatee should compound with his creditors the legacy would be forfeited. He held further as a matter of construction of that particular deed that the interest which the legatee took under the will was not included in it. The reason, as I understand his judgment, for that conclusion was that the interest not being in terms included in the document he could not impute to the legatee an intention to include in it an interest which, if included, would create a forfeiture and thus prevent the property coming within its scope. Far be it from me to say that the learned Vice-Chancellor did not correctly construe the relevant words in that case; but that was a question which turned upon the true construction of particular words which were not the same as the words which I am construing here. If that decision were to be applied in all cases it would really make it impossible for a forfeiture ever to be created unless the actual interest in question was in terms specified in the document. In my judgment the learned Vice-Chancellor never meant to go so far as that, and treating that case as a decision on the construction of that document it does not appear to me that I am bound to follow it when I have to construe other words under a different document altogether.

I cannot doubt myself that this document is amply wide enough to include the interest which this gentleman took under the will now in question. I was referred by counsel for the tenant for life to the words "that these presents shall be as effectual as if every particular of my means and estate were herein specially enumerated." I asked him whether if he had to write out or put into a schedule what those means and estates were, he would not be bound to include the interest under this will. He was driven to admit he would have to include it, but added that he would try to safeguard

himself by putting in brackets the reference to a forfeiture. Nevertheless, on the language of this document, it is plain, in my judgment, that the legatee here was including in it all his estates and interest, and that there was an estate or interest in him under this will, notwithstanding that he might forfeit it as the result of this document, seems to me to be beyond all argument. If this be a valid document at all it appears to me it must have the effect of having produced a forfeiture of the interest given under the will.

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That brings me to the second question which, in my judgment, is more difficult than the first. It is said that this is a deed of arrangement and that by virtue of s. 2 of the Deeds of Arrangement Act, 1914, it is void because it was not registered, and if it be not registered it cannot have any operation and so is not an effective document and does not create a forfeiture. Sect. 1, sub-s. 1, of the Act provides: "A deed of arrangement to which this Act applies shall include any instrument of the classes hereinafter mentioned whether under seal or not." The first is one "made by, for or in respect of the affairs of a debtor for the benefit of his creditors generally." That definition is wide enough to include this deed. Sect. 2 of the Act provides: "A deed of arrangement shall be void unless it is registered with the Registrar of Bills of Sale under this Act within seven clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England, if posted within one week after the execution thereof, and unless it bears such ordinary and ad valorem stamp as is provided by this Act." I do not know that I need refer to any other section of the Act beyond s. 32, sub-s. 2, which provides, in terms, that: "This Act shall not extend to Scotland or Ireland."

If this particular document is a deed of arrangement within the meaning of that Act and it has not been registered it is void and cannot be effectual to create a forfeiture. The first thing that one notices in reading this document, and it is

FARWELL J. perfectly plain on the face of it, is that the law which was intended to be applied in dealing with it is the law of Scotland and not the law of England. The language of it is more familiar to those who practice Scottish law than to English lawyers. Moreover there is an express reference in the document to the Bankruptcy (Scotland) Act, 1913. So far as I am aware there is no such necessity for registration in Scotland of a document of this character as there is in England under the Deeds of Arrangement Act. The situation, therefore, comes to this. This is a document signed by a person domiciled in this country but temporarily residing in Scotland. The property is movable, not immovable, and there is a right to receive income under a trust which was created in England and is subject no doubt to the law of England. Is it then necessary in order that the trustee under this document should be able to assert his title to property in this country that he should have had this document registered under s. 2 of the Deeds of Arrangement Act, or is he entitled to say: "This was an instrument signed in Scotland, it is a perfectly valid document according to Scottish law, and I, as the person entitled under it according to that law, now claim to recover the property in question"?

Although I think the question is one of considerable difficulty, having listened to arguments of counsel on both sides and considered the authorities to which I have been referred, I have come to the conclusion that this document is valid in this country to this extent, that, since according to the law of Scotland it is a valid document, if the trustee sought to recover movable property here from the persons in whose hands it was, he would be entitled to rely on it as constituting his title to sue and to recover, and there would be no necessity for him to get it registered in England, because it was intended to and does in fact operate according to the law of Scotland and not the law of England, and it is, therefore, not such a deed of arrangement as is referred to in the Act and is required by it to be registered. In my judgment this document is effective and the language is wide enough to include the interest which Francis Charles Harrison took

under the will, and accordingly there has been a forfeiture of that interest and the discretionary trust in favour of himself and wife and children has come into operation.

Solicitors : *Farrer & Co. ; Norris, Allens & Co., for W. & H. Considine, Edinburgh ; Torr & Co. ; Waltons & Co. ; A. F. & R. W. Tweedie.*

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F. H. C.

BENNETT J. PORTMAN v. J. LYONS AND COMPANY, LIMITED.

1936
 Nov. 24.

[1936. P. 1802.]

Landlord and tenant—Lease—Covenant to produce assignment or under-lease—Under-lease of whole followed by underlease of part to lessee—Application of covenant to such underlease.

The defendants were lessees of certain property from the plaintiffs. The lease contained a covenant in the usual form that assignments or under-leases should be produced to the plaintiffs or their agents for registration. The defendants sub-leased the whole of the property to a company, which on the same day sub-leased part to the defendants. The plaintiffs asked for production of the sub-lease by the company, but the defendants replied that the covenant in the head-lease did not apply:—

Held, that the covenant was applicable to the sub-lease by M. B. to the defendants.

ADJOURNED SUMMONS.

On December 31, 1934, the plaintiffs, as lessors, granted a lease to the defendants for a term of $88\frac{3}{4}$ years of property known as "Mount Royal" on the north side of Oxford Street in the county of London. The lease contained a covenant "that the lessees will within two calendar months next after the execution of every assignment or under-lease (except in connection with lettings or assignments of such lettings of flats for terms not exceeding seven years of which lettings or assignments the lessees shall from time to time furnish to the lessor forthwith upon request by him full particulars) of the demised premises or any part thereof produce or cause to be produced such assignment or under-lease or the counterpart thereof and will within two calendar months after grant of Probate or Letters of Administration in the case of a deceased assignee (other than an assignee of such lettings as aforesaid for a term not exceeding seven years) produce the same to the lessor or his successors in title for the time being entitled in immediate reversion on the term hereby granted or to his or their solicitor or appointed agent for that purpose and will permit a docket or minute of

every such assignment or under-lease Probate or Letters of Administration to be made and retained by or for the use of the lessor or his successors in title entitled as aforesaid and will pay to the person making each such docket or minute the sum of one guinea for the cost of making the same."

The property known as Mount Royal consisted of shops and flats, and on February 11, 1935, the defendants granted an under-lease to the Midland Bank Executor and Trustee Co., Ltd., of the whole of the demised premises for eighty years, and on the same date the under-lessees granted an under-lease to the defendants of part of the premises for eighty years less one day. The under-lease by the defendants was duly notified under the aforesaid covenant but the plaintiff, head-lessor, asked for notice of the under-lease of part by the said Executor and Trustee Co. to the defendants. This demand gave rise to the question (as amended) in the summons: "that it may be declared under Order LIVA. that according to the true construction of a lease dated the 31st December, 1934, and made between the plaintiff of the one part and the defendants of the other part of certain property on the north side of Oxford Street in the county of London known as Mount Royal the defendants as lessees are bound to produce or cause to be produced to the plaintiff as lessor or his solicitor or agent for registration as provided by the said lease the under-lease dated the 11th February 1935 and made between the Midland Bank Executor and Trustee Co., Ltd., of the one part and the defendants of the other part."

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—

R. F. Roxburgh K.C. and *F. McMullan* for plaintiffs. The covenant applies. This is clear from the provision regarding the death of an assignee and the exception of the letting of flats for less than seven years.

Cyril Radcliffe K.C. and *L. F. Potts* for the defendants. The claim is an extravagant one and a less extravagant meaning should be taken if the language can be so construed. The real question is whether, in the events which have happened, the language allows the wider interpretation. The covenant only applies to the subject-matter of the original lease; that

BENNETT J. is to say, not merely to the physical property, but to the physical property subject to and with the benefit of the covenants and conditions in the lease.

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BENNETT J. The question that falls to be decided is, upon the true construction of the lease dated December 31, 1934, made between the plaintiff of the one part and the defendants of the other part. The Court is asked to declare as to certain property on the north side of Oxford Street in the county of London known as "Mount Royal," that the defendants as lessees are bound to produce or cause to be produced to the plaintiff as lessor or his solicitor or agent for registration as provided by the said lease the under-lease dated February 11, 1935, and made between the Midland Bank Executor and Trustee Co., Ltd., of the one part and the defendants of the other part.

The lease, which was granted on December 31, 1934, demises to the defendants a site on the north side of Oxford Street for a term of $88\frac{3}{4}$ years.

On February 11, 1935, the defendants demised the same premises to the Midland Bank Executor and Trustee Co., Ltd., for the term of 80 years from June 24, 1932, and the same day the Midland Bank Executor and Trustee Co., Ltd., underlet part of the demised premises to the defendants for the term of 80 years less one day from June 24, 1932. It is that under-lease which the plaintiff says the defendants are bound by the covenant in the head-lease to produce to his solicitor for registration.

The covenant is in these terms: "That the lessees will at the cost and charges of the lessees within two calendar months next after the execution of every assignment or under-lease (except in connection with lettings or assignments of such lettings of flats for terms not exceeding seven years of which lettings or assignments the lessees shall from time to time furnish to the lessor forthwith upon request by him full particulars) of the demised premises or any part thereof produce or cause to be produced such assignment or under-lease or the counterpart thereof and will within two calendar

months after grant of Probate or Letters of Administration in the case of a deceased assignee (other than an assignee of such lettings as aforesaid for a term not exceeding seven years) produce the same to the lessor or his successors in title for the time being entitled in immediate reversion on the term hereby granted or to his or their solicitor or appointed agent for that purpose and will permit a docket or minute of every such assignment or under-lease Probate or Letters of Administration to be made and retained by or for the use of the lessor or his successors in title entitled as aforesaid and will pay to the person making each such docket or minute the sum of one guinea for the cost of making the same."

The question is whether the under-lease of February 11, granted by the Midland Bank Executor and Trustee Co., Ltd., to the defendants is an under-lease within the meaning of that covenant, and it is sought to say that it is not because it is not an under-lease of a part of the demised premises within the meaning of the covenant but of some other premises. The argument was that "demised premises" means something physical, some physical property, tied up by the terms and conditions of the original lease, and that that which is demised by the under-lease in question, although it is a demise of part of the physical property, is not a demise of part of it tied up by the conditions of the original lease, but of something which is tied up by the conditions of another document. I see no reason for putting that construction upon the covenant, particularly having regard to the exception from registration which is to be found in the covenant, which exception makes it impossible, I think, to accede to that view of the meaning of "demised premises."

I therefore propose to make a declaration on the summons as amended in the affirmative.

Solicitors : *Wilde, Sapte & Co. ; Bartlett & Gluckstein.*

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& Co.
—

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J.

1937

June 3.

In re GLADITZ.GUARANTY EXECUTOR AND TRUSTEE COMPANY,
LIMITED *v.* GLADITZ.

[1936. G. 1672.]

Insurance (Life)—Husband and wife—Accident policy taken out by husband—Sums payable on injury causing death or disablement—Whether “policy of assurance effected by any man on his own life”—Memorandum that all claims payable to wife if then living—Whether policy expressed to be for benefit of wife—Married Women’s Property Act, 1882 (45 & 46 Vict. c. 75), s. 11.

By the Married Women’s Property Act, 1882, s. 11: “. . . . A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts”

A policy of insurance provided for the payment of certain specified sums by the underwriters on death or disablement of the assured caused by accident. It contained a memorandum stating that it was understood and agreed that all claims thereunder should be payable to his wife, “if she is living at the happening of the event upon which the claim becomes payable, or if she is dead, then to the executors, administrators and assigns of the assured.” The assured died as the result of an accident within the policy, his wife surviving him:—

Held, (1.) that the policy was one effected by the assured on his own life within the meaning of the Married Women’s Property Act, 1882;

(2.) that it was expressed to be for the benefit of his wife within the meaning of the same section: *In re Fleetwood’s Policy* [1926] Ch. 48 and *Griffiths v. Fleming* [1909] 1 K. B. 805 followed;

(3.) that, accordingly, his wife was solely and beneficially entitled to the moneys payable thereunder.

ADJOURNED SUMMONS.

On November 19, 1934, Charles Julius Gladitz took out a Lloyd’s accident policy whereby the underwriters agreed with the assured that “if at any time during the period commencing on November 4, 1934, and ending on November 3, 1935, both days inclusive, with fifteen days’ grace after expiry for renewal, the assured shall sustain any bodily

injury caused by accidental, violent, external and visible means which shall solely and independently of any other cause, within three calendar months from the date of the accident causing such injury, occasion his death or disablement as hereinafter defined, and a claim be substantiated under this policy, we will pay the assured, his executors, administrators or assigns, according to the schedule of compensation hereunder specified” The schedule provided for payment of 15,000*l.* in the event of death, and lesser sums in the event of loss of limbs, or of the sight of his eyes.

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Condition 1 provided: “This policy does not cover death or disablement directly or indirectly caused or contributed to by war or invasion, intentional self-injury, disease or natural causes, suicide or attempted suicide (whether felonious or not), provoked assault, duelling or fighting (except in bona fide self defence) nor does it cover death or disablement directly or indirectly resulting from medical or surgical treatment (except where such treatment is rendered necessary by bodily injury from accident within the scope of this policy) or resulting from the assured deliberately exposing himself to exceptional danger (except in an attempt to save human life) or resulting from his own criminal act; nor does it cover death or disablement resulting from bodily injury occasioned or occurring while the assured is in a state of insanity (temporary or otherwise) or in a state of intoxication, or while engaged or taking part in military or naval service or operations, or civil commotions or riots of any kind, or in aeronautics and/or aviation of any description, or resulting from being in any aircraft, or while riding or driving in any kind of race. Accidental death shall not be presumed by reason of the disappearance of the assured”

The policy contained the following memorandum: “It is understood and agreed that all claims under this policy shall be payable to Winifred Gladitz, née Worthington, wife of the assured, if she is living at the happening of the event upon which the claim becomes payable, or if she is dead, then to the executors, administrators or assigns of the assured

BENNETT J. whose receipt shall be deemed sufficient discharge and relieve underwriters thereon."

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The assured having died on March 8, 1935, as the result of an accident within the policy, this summons was taken out by his executors to determine whether the widow was solely and beneficially entitled to the sum payable under the policy, or whether it formed part of the estate of the assured.

Andrew Clark for the plaintiffs. The moneys form part of the estate of the assured and the widow is not entitled to them under s. 11 of the Married Women's Property Act, 1882. The policy does not fall within the description "a policy of assurance effected by any man on his own life." The words indicate a policy payable on death in any event, and a policy which does not include death from natural causes cannot be within them. The Assurance Companies Act, 1909 (1), s. 30, defines a "policy on human life" as "any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life. . . ." The Stamp Act, 1891 (2), s. 98, sub-s. 1, provides: "For the purposes of this Act the expression 'policy of life insurance' means a policy of insurance upon any life or lives, or upon any event or contingency relating to or depending upon any life or lives, except a policy of insurance against accident, and the expression 'policy of insurance against accident' means a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence or otherwise than from a natural cause, or as compensation for personal injury. . . ." In this case the insurance was against the risk of accident and not against the risk of death. Further, this was not a policy "expressed to be for the benefit of his wife," within the section. This case is exactly governed by *In re Engelbach's Estate. Tibbetts v. Engelbach* (3) which followed *Cleaver v. Mutual Reserve*

(1) 9 Edw. 7, c. 49.

(3) [1924] 2 Ch. 348.

(2) 54 & 55 Vict. c. 39.

Fund Life Association. (1) The widow of the deceased had no legal right to recover the policy moneys and no trust was created in her favour.

C. R. R. Romer K. C. and M. R. C. Overton for Mrs. Gladitz. The widow is entitled to the policy moneys under the express provisions of the Married Women's Property Act, 1882, s. 11. The policy was one effected by the deceased on his own life. The fact that the contingency of death on which the moneys were payable was only death in certain events did not make it any the less a policy of assurance on his life. In all assurance policies there are qualifications on the liability of the underwriters, as, for instance, the exclusion of death by suicide. It is not material that moneys were also payable under this policy in events other than death. Any policy under which money is to be paid on the death of the assured is within this section: *In re Ioakimidis' Policy Trusts. Ioakimidis v. Hartcup.* (2) The section, being for the benefit of husbands and wives, should be widely interpreted. Further, this policy was expressed to be for the benefit of the wife of the deceased: *In re Fleetwood's Policy* (3); *Griffiths v. Fleming.* (4)

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Hon. Denys Buckley for an infant child.

Andrew Clark in reply.

BENNETT J. [having stated the facts:] It is on those facts that the question arises whether the wife is entitled to the sum payable under the policy or whether it forms part of the deceased's estate. The claim of the wife rests upon the provisions of s. 11 of the Married Women's Property Act of 1882, the terms of which, so far as material, are these: " A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour

(1) [1892] 1 Q. B. 147.

(2) [1925] Ch. 403.

(3) [1926] Ch. 48.

(4) [1909] 1 K. B. 805.

BENNETT of the objects therein named, and the moneys payable under
 J. any such policy shall not, so long as any object of the trust
 1937 remains unperformed, form part of the estate of the insured,
 GLADITZ, or be subject to his or her debts. . . .”
In re.

GUARANTY Two questions arise upon the meaning of this section ;
 EXECUTOR the first is whether this is a policy of assurance effected by
 AND the deceased Charles Julius Gladitz on his own life, and the
 TRUSTEE CO. second is whether, being in the form which I have stated,
 v. it is a policy expressed to be for the benefit of his wife. In my
 GLADITZ. judgment both questions should be answered in the affirmative.

As regards the first, I see no reason for restricting the meaning of the phrase “a policy of assurance effected by a man on his own life,” and deciding that a policy which, besides including provision for payment upon the happening of a man’s death by a particular cause, also provides for payment upon the happening of a number of other events, is not a policy within the meaning of the section. In my judgment this policy, providing, as it does, for payment of a sum of money upon the death of a man as the result of an accident, is a policy of assurance effected by the man on his own life.

The next question is whether it is expressed to be for the benefit of his wife. The only provision is the memorandum at the foot of the policy that : “It is understood and agreed that all claims under this policy shall be payable to Winifred Gladitz, née Worthington, wife of the assured, if she is living at the happening of the event upon which the claim becomes payable”. I should myself, I think, have been doubtful whether that was a sufficient expression that the policy was to be for the benefit of Mrs. Gladitz if it had not been for two decisions, one by Tomlin J. in *In re Fleetwood’s Policy* (1), and the other by Farwell and Kennedy L.JJ. in *Griffiths v. Fleming*. (2) In both those cases it seems to me to have been decided that words which in substance are not distinguishable from the memorandum at the foot of the policy in question were a sufficient expression of intention that the policy was for the benefit of the person to whom

(1) [1926] Ch. 48.

(2) [1909] 1 K. B. 805.

the policy moneys are to be paid. Both decisions bind me and I propose to follow them; and upon the authority of them I decide that this is a policy expressed to be for the benefit of Mrs. Gladitz within the meaning of s. 11 of the Married Women's Property Act of 1882.

I, therefore, hold that she is solely and beneficially entitled to the sum paid by the underwriters under the policy and that the moneys do not form part of the estate of Charles Julius Gladitz, deceased.

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Solicitors: *Mead & Dennis ; Templer & Passmore.*

F. H. C.

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COMPANIES COURT.

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Dec. 16, 17.

1937

Jan. 28, 29.

In re GARNER'S MOTORS, LIMITED.

[No. 00502 of 1936.]

*Accord and satisfaction—Joint and several debt by two companies—
Scheme of arrangement of the affairs of one company—Release of
the debt of that company—No release of the joint and several debt
of the other company.*

Although an accord and satisfaction between a creditor and one of several joint and several debtors discharges the other joint and several debtors unless it appears from the terms of agreement or the surrounding circumstances that the creditor intended to reserve his right against them, yet when the debt of one of the joint and several debtors, being a company, is released by a scheme of arrangement in the liquidation of that company, that scheme does not release the other debtors. The scheme has a statutory operation and is quite different from an agreement signed by the parties, and it is not necessary for the scheme to reserve the rights of those debtors.

ADJOURNED SUMMONS.

This was an application in the Companies Court by Temple Press, Ltd., that the decision of the joint liquidators of Garner's Motors, Ltd., rejecting the proof of debt of the applicants for 379*l.* 5*s.* 10*d.* might be reversed and that the proof might be allowed in full.

Temple Press, Ltd., is a company carrying on the business of printers and publishers, and amongst other publications the company publishes a monthly publication called "The Commercial Motor" in which those engaged in the commercial motor trade insert advertisements. Among those advertising in "The Commercial Motor" in October, 1934, were two companies carrying on business at Shrewsbury called the Sentinel Waggon Works, Ltd. (hereinafter called "the Sentinel Company"), and Garner's Motors, Ltd., who had done business with the Temple Press, Ltd., at different times. These two companies had the same publicity agent, Mr. J. W. Bennett, and it was the custom for the Birmingham representative of

the applicants, Mr. A. G. Viggers, to obtain orders for advertisements in the applicants' paper by both companies from Mr. Bennett. Before October, 1934, the applicants had separate contracts with the two companies; but on October 9 a new arrangement was made by which the order form given by Mr. Bennett should be for twenty-six whole page spaces for advertisements to be reserved every other week, commencing in the issue of November 9, 1934, at the rate of 18*l.* per insertion, and that such spaces should be used either by the Sentinel Company or Garner's Motors or jointly (terms monthly accounts net), and that the then existing arrangements between the applicants and both companies should be cancelled. Pursuant to this arrangement twelve advertisements were inserted in the applicants' paper from November 9, 1934, down to April 26, 1935, of which three were of the goods of the Sentinel Company and nine (including three double advertisements on April 5, 12, and 26, 1935) of the goods of Garner's Motors.

In respect of these advertisements the only payments made to the applicants were 36*l.* by the Sentinel Company in respect of the advertisements of November 9 and 23, 1934, paid on January 27, 1935, and 54*l.* by Garner's Motors in respect of the advertisements of December 7 and 24, 1934, and January 25, 1935.

On April 15, 1935, T. W. Welsh was appointed receiver and manager of the Sentinel Company on behalf of the debenture-holders of that company. In April, 1935, a scheme of arrangement of the affairs of the Sentinel Company was made between that company and the holders of the preferred and ordinary shares of that company and the unsecured creditors of that company which provided for the formation of a new company called the Shropshire Waggon Works (1936), *Ld.*, to take over the business assets and liabilities of the Sentinel Company. By clause 15 it was provided that the new company should pay to each of the unsecured creditors of the Sentinel Company the sum of five shillings in cash for every pound of his debt or claim and a further sum equal to one-twelfth of his debt or claim to be satisfied by

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CROSSMAN an income note of corresponding nominal amount, part of a series of income notes of the new company as provided by the scheme, and that these unsecured creditors should accept such provisions in their favour in full satisfaction and discharge of all their claims against the Sentinel Company and the assets thereof. This scheme was sanctioned by the Court on March 23, 1936. The applicants accepted the scheme as a discharge of all liability to them of the Sentinel Company, but did not intend thereby to give up their claims against Garner's Motors. In pursuance of the arrangement Temple Press received the sum of 94*l.* 16*s.* 5*d.* in cash and an income bond in the new company of the nominal value of 51*l.* 12*s.* 2*d.*

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—

The applicants, in view of the intended continuance of the liability of Garner's Motors to them of the joint debt, declined to sign the receipt in the form sent to them, and in lieu thereof signed a receipt in the following form:—

"Received from the Shropshire Wagon Works (1936), LD., the sum of 94*l.* 15*s.* 5*d.* together with an income note of the nominal amount of 51*l.* 12*s.* 2*d.* on account of the joint indebtedness to us of the Sentinel Waggon Works, LD., and Garner's Motors, LD., in the sum of 379*l.* 5*s.*"

On June 5, 1935, Garner's Motors went into voluntary liquidation and joint liquidators were appointed.

The applicants, claiming that the provisions of the scheme of arrangement only affected the debts of the Sentinel Company to Temple Press, LD., and not the joint or several debts of Garner's Motors, sent in a proof to the liquidators for the sum of 379*l.* 5*s.*, which was the sum due to them in respect of Garner's Motors' insertions in "The Commercial Motor."

On July 24, 1936, the joint liquidators rejected the proof on the ground that if there had been any joint liability on the part of Garner's Motors the contract had been completely discharged under clause 15 of the scheme of arrangement for the reconstruction of the Sentinel Company, whereby it was provided that the unsecured creditors of the Sentinel Company should accept the provisions in their favour in full satisfaction of all their claims against that company and that the

acceptance by Temple Press of the sum of 94*l.* 6*s.* 5*d.* and the issue to them of the income notes for 51*l.* 12*s.* 2*d.* amounted to an accord and satisfaction equivalent to a release of the Sentinel Company from the entire debt and that as a result of such release the whole debt was extinguished and that the form of receipt given by the applicants in no way affected the provisions of clause 15, and that the joint liability of Garner's Motors, *Ld.*, had been thereby extinguished.

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—

On August 13, 1936, Temple Press issued this summons in the liquidation of Garner's Motors, *Ld.*, asking that the decision of the joint liquidators rejecting the proof of the debt to Temple Press, *Ld.*, might be reversed and that the proof might be allowed in full. The summons was adjourned into Court.

J. H. Lazarus for the applicants. I admit that in the ordinary course of things the law is that the release of one of several debtors by the creditor releases the other debtors ; but that rule does not apply in a case like the present, where the release is effected by statutory authority. The scheme here has a statutory effect, and though the Sentinel Company was released under the scheme the applicants were entitled to reserve their rights against Garner's Motors as they did in the form of receipt which they gave : see the judgment of the Appeal Court in *Dane v. Mortgage Insurance Corporation*. (1) As to what constitutes an accord and satisfaction by release of a co-debtor see *In re E. W. A., a Debtor*. (2)

I submit that here there has been no release of Garner's Motors and that the proof of the applicants ought to be admitted. See also *Ex parte Jacobs*. (3)

Maurice Berkeley for the liquidators. The liquidators were right in rejecting the proof. *In re E. W. A., a Debtor* (2), so far from assisting the applicants' case, supports my contention : see Buckley's Companies Act, pp. 314-5. In *Ex parte Jacobs* (3) there was a discharge of a debtor by a composition with his creditors which was held to discharge a co-debtor

(1) [1894] 1 Q. B. 54.
(2) [1901] 2 K. B. 642.

(3) (1875) L. R. 10 Ch. 211.

CROSSMAN who had signed the composition. But that is an entirely different matter. See also *Slater v. Jones* (1), which was a case of discharge by a composition. I submit that there is no authority which applies to such a case as this, and that Garner's Motors were discharged from their debt by the scheme despite the form of receipt given by the applicants on the acceptance of their claim under the scheme.

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Lazarus in reply.

CROSSMAN J. This is an application by Temple Press, Ltd., claiming to be a creditor of Garner's Motors, Ltd., a company which is in voluntary liquidation by virtue of a resolution passed on June 5, 1935. The application is that the decision of the joint liquidators of Garner's Motors, Ltd., rejecting the proof of the debt of Temple Press, Ltd., for 379*l.* 5*s.* may be reversed, and that the said proof may be allowed in full. Temple Press, Ltd., claims that under an order dated October 9, 1934, for the insertion of advertisements in its publication, which is called "The Commercial Motor," and an acceptance dated October 11, 1934, Garner's Motors, Ltd., and a company called Sentinel Waggon Works, Ltd., became jointly or jointly and severally liable to pay to Temple Press, Ltd., the sum of 379*l.* 5*s.* The liquidators contend that Garner's Motors, Ltd., was discharged from its liability by the fact that on March 23, 1936, a scheme of arrangement between Sentinel Waggon Works, Ltd., and its creditors was sanctioned by the Court under s. 153 of the Companies Act, 1929. It is settled law that accord and satisfaction between a creditor and one of several debtors, who are jointly and severally liable to the creditor, discharges the other debtors unless it appears from the terms of the agreement or the surrounding circumstances that the creditor intended to reserve his rights against them. The law is in my opinion correctly stated in Halsbury's Laws of England (second edition), vol. 7, p. 237, para. 324. But in my judgment a discharge of one of several joint debtors by operation of law does not discharge the other debtors. In my judgment the effect of s. 153 of the Companies

Act, 1929, is to give to a scheme when sanctioned by the Court under the section a statutory operation. The scheme when sanctioned by the Court becomes something quite different from a mere agreement signed by the parties. It becomes a statutory scheme. In my judgment, therefore, the discharge of Sentinel Waggon Works, Ltd., from the debt to Temple Press, Ltd., which was effected under clause 15 of the scheme sanctioned by the Court on March 23, 1936, did not have the effect of discharging Garner's Motors, Ltd., from its liability in respect of the debt. It is settled law that a discharge of one of several judgment-debtors by operation of law does not release the other debtors. But in my judgment the effect of s. 153 of the Companies Act, 1929, is to give a scheme when sanctioned by the Court a statutory operation. I think that the law is correctly stated in Buckley, 12th ed., p. 322, as in Halsbury, vol. 5, p. 797, para. 1366.

In my judgment, therefore, the scheme, which provides that "The unsecured creditors of the present company shall accept the provisions in their favour contained in this Scheme in full satisfaction and discharge of all their claims against the present company and the assets thereof—" did not release Garner's Motors, Ltd., which was jointly liable with the company which was being released by clause 15 from the liability.

Solicitors for the applicant : *Heywood & Ram.*

Solicitors for the liquidators : *Constant & Constant.*

E. K. C.

CROSSMAN
J.

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LD.,
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Dicta of SIMONDS, J., at pp. 604, 605, applied. Re GUNTER'S SETTLEMENT TRUSTS. [1949] 1 All E.R. 680.

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April 15, 21.

In re LEEKE'S SETTLEMENT TRUSTS.

BOROUGH *v.* LEEKE.

[1936. L. No. 2100.]

Settlement—Settled land—Power to tenant for life to charge estates for raising portions for children—Exclusion of first or only son indefeasibly entitled in tail male—Exercise of power—Estates disentailed and resettled—Death of tenant in tail before becoming entitled in possession—Estate of tenant in tail excluded from sharing in portions.

Whenever a son, entitled to an estate in remainder under a settlement of real property which, if it were an estate in possession, would exclude him from sharing in any portions charged on the property, has exercised, by virtue of his estate in remainder, dominion over and disposed of the settled property, he at once becomes and remains excluded from the portions provision. In observing this principle the Court will not measure the benefit to himself or the detriment to others which the son so disentailing the settled property creates.

ADJOURNED SUMMONS.

On June 19, 1876, a resettlement was made of the Leeke family estates in Shropshire whereby the estates were settled on Ralph Merrick Leeke for his life with remainder to Ralph Leeke (hereinafter called Colonel Leeke) for his life, with remainder to his first and other sons successively in tail male, with remainder to uses, under which, in the events which happened, the defendant Edwin Hugh Leeke became entitled to the first estate tail in remainder. The resettlement contained, among other provisions, a power for Colonel Leeke and other persons as therein mentioned, to charge the settled estates "with the payment of any sum or sums not exceeding in the different events hereinafter specified the different sums hereinafter mentioned for the portion or portions of his child or children or any one or more exclusively of the other or others of his children (other than a first or only son entitled or daughter indefeasibly entitled under or by virtue of these presents to the said premises for the first estate in tail male or in tail respectively) that is to say If there shall be but one such child the sum of Five thousand pounds And if there

shall be two or more such children the sum of ten thousand pounds," and it provided that Colonel Leeke should have the usual power of appointment over such sums. Colonel Leeke exercised the power, so reserved to him, by a settlement made on December 5, 1881, in contemplation of his marriage, whereby he charged the settled estates with the payment of sums for the portions of the children of the intended marriage excluding in identical words the children who, by the re-settlement of 1876, were excluded from the ambit of the power, the sums being, if there should be only one child who became a proper object of the power, the sum of 5000*l.*, to be an interest vested in such child being a son at twenty-one, or being a daughter at twenty-one, or marriage, and to be paid to him or her at the date of vesting if the same should happen after the death of the survivor of Ralph Merrick Leeke and Colonel Leeke, and if the same should happen during the life of such survivor then immediately after his death, and, if there should be two or more such children, the sum of 10,000*l.* with a power of appointment among them reserved to Colonel Leeke.

Ralph Merrick Leeke died in 1882, and Colonel Leeke succeeded to the property as tenant for life. He had two sons only of his marriage, Ralph Henry Leeke, who was born on December 7, 1883, and died a bachelor and intestate on November 5, 1915, and Charles Leeke, who was born on March 26, 1887, and died a bachelor on April 11, 1916. Colonel Leeke was the legal personal representative of his son Ralph Henry Leeke. The defendant Edwin Hugh Leeke, a nephew of Colonel Leeke, was entitled to the first estate tail in remainder.

Ralph Henry Leeke came of age on December 7, 1904, and on April 19, 1905, he, with the consent of Colonel Leeke as protector of the settlement, executed a disentailing assurance whereby, leaving untouched all estates and interests before his own estate tail, he effectually disentailed the settled estates and limited them in the first place to such uses as Colonel Leeke and he should jointly appoint and subject thereto to the uses on the trusts and subject to the powers and provisions on and subject to which they

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SIMONDS stood immediately before the disentailing assurance. The joint power of appointment thus created was exercised once only—namely, on April 20, 1905, the day after the disentailing assurance, when, by a mortgage of that date, the sum of 29,000*l.* was raised on the security of the settled estates. Of this sum of 29,000*l.*, 23,000*l.* was paid to prior mortgagees by the direction of the mortgagee, who took a transfer of their mortgages, and a further 5000*l.* was applied in the discharge of subsisting incumbrances of the settled estates. Of the remaining 1000*l.* all except 57*l.* 13*s.* 3*d.* was applied in payment of costs of and incidental to the transaction and the discharge of family charges. The sum of 57*l.* 13*s.* 3*d.*, and no more, was paid to Ralph Henry Leeke himself.

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The plaintiffs, who were trustees of the settlement, took out this summons to determine the question whether the estate of Ralph Henry Leeke, deceased, was entitled to any, and if so, what share in the sum or sums charged by Colonel Leeke under the power for charging for portions contained in the settlement of June 19, 1876.

Geoffrey Cross for the plaintiffs, the trustees.

Fergus Morton K.C. and *R. H. Hodge* for the defendants, Colonel and Mrs. Leeke. At the time of distribution there must be a person answering to the description in the settlement. If there had been no disentailing deed or a mortgage, Ralph Henry would never have become entitled to the estate at all. The fact that there had been a disentailment, resettlement and a mortgage does not affect the result. The eldest is not only the eldest in age : *Collingwood v. Stanhope*. (1) If the eldest son dies, his estate becomes a "younger child." In this case Ralph Henry Leeke cannot be said to have had any benefit of the estate. [They referred to *In re Fitzgerald's Settled Estates* ; *Saunders v. Boyd* (2) and *Rooke v. Plunkett*. (3)] If power of disposition is enough, it is fatal to the defendants' case ; but we submit it is not enough. The substance of the matter must be looked at and whether the estate has been depleted.

(1) (1869) L. R. 4 H. L. 43.

(3) [1902] 1 I. R. 299.

(2) [1891] 3 Ch. 394, 398.

R. F. Roxburgh K.C. and *Cecil Preston* for the third defendant, the tenant in tail in remainder.

There is no case in which it has been held that where you are looking for the "first son" and not "the eldest son," the person must be ascertained at the period of distribution.

No one can become a "first son" by the decease of his elder brother.

In the case of a marriage settlement none of the sons are in esse at the date of the settlement. The first son will always be the first son during his life, and will have been the first son after his death.

The only thing, says Lord Westbury in *Collingwood v. Stanhope* (1), to be looked for at the date of distribution is whether the son concerned has the character of eldest son entitled.

Ralph Henry was a first son: Charles was not and never could have been a first son.

The present is not an occasion to extend the law of primogeniture.

Morton K.C. replied.

Cur. adv. vult.

1937. April 21. SIMONDS J. The question raised by this summons is whether the estate of Ralph Henry Leeke, deceased, the eldest son of the defendant Ralph Leeke, is entitled to any and, if so, what share in the sum or sums charged by the defendant Ralph Leeke under the power in that behalf contained in a settlement made on June 19, 1876, of certain properties in Shropshire. Counsel on both sides aver that the point for my decision is not precisely covered by any authority. [His Lordship stated the facts, substantially as above set out, and continued:] The question, and the only question, which I have to determine is whether the elder son, Ralph Henry Leeke, was or was not precluded from taking a portion. It is conceded that he would not be so precluded if he had not entered into

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the transactions which I have mentioned. It is contended on behalf of the remainderman that Ralph Henry Leeke comes within the exclusion clause and is precluded from taking a portion, so that 5000*l.*, and no more, will be raisable for portions on the death of Colonel Leeke, while it is contended by Colonel Leeke as his legal personal representative that he is not so precluded so that a sum of 10,000*l.* will be raisable, of which 5000*l.* would go to the estate of Ralph Henry Leeke.

To determine this question I have to decide whether Ralph Henry Leeke was, within the meaning of the exclusion clause, a first or only son entitled under or by virtue of the settlement to the settled estates for the first estate in tail male. In coming to my decision I must be guided by the principles affirmed by Lord Hatherley in *Collingwood v. Stanhope* (1): "The Court, with regard to all questions arising on provisions for children under a marriage settlement, holds that the principal intent to be imputed to the parties (however differently that intent may be expressed, so long as it is not contrary to what is actually found in the settlement) is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded." So it is that, though an "eldest" son or an "elder" son is by the terms of a settlement excluded from portions and a certain son has in nature that character, yet he is not excluded if he does not in fact succeed to the settled estates, for in such a context, as Lord Hardwicke said in *Duke v. Doidge* (2): "Eldership not carrying the estate along with it is considered not such an eldership as shall exclude."

So, too, if the exclusion be of a "first" or "only" son, it does not operate unless that first or only son in fact succeeds to the estate. It is for this reason that, though Ralph Henry Leeke was the first son of his father and was during the whole of his life entitled to the first estate in tail male in remainder, it could not be argued that he was excluded from the portions provision had he not entered into the transactions which I have detailed. So also a son, who is in nature a younger

(1) L. R. 4 H. L. 43, 52.

(2) (1746) 2 Ves. Sen. 203.

or a second son may, by the death of an elder brother, succeed to the settled estates and be excluded from a portion. Consistently with the principle which I have stated, it is at the date when the portions are distributable that it must be ascertained whether a child is or is not entitled to a portion. This is made abundantly clear from *Collingwood v. Stanhope* (1) and the cases there cited. In the present case the date of distribution has not yet arrived, but the circumstances do not admit of any event happening which can affect the rights of the parties.

I have, in examining the general principles according to which the Court construes an exclusion clause, used a loose expression, "succeeds to the estates," which at that stage of my consideration was accurate enough. But it is now necessary to examine more closely what are the circumstances which, when the date of distribution arrives, enable one to say of a child that he has or has not or had or had not such an estate as to exclude him from portions. It is, for instance, clear that it is not necessary, in order that he may be excluded, that he should in fact enjoy an estate in possession in the settled estates at the date of distribution. It is sufficient, as Lord Westbury pointed out in *Collingwood v. Stanhope* (2), that the person who is to be excluded should at some time have been entitled to the estate. And as Chitty J. held in *In re Fitzgerald's Settled Estates*, *Saunders v. Boyd* (3) it is sufficient to exclude him if being then entitled to an estate in remainder he has with the assistance of his father, the tenant for life, procured for himself out of the settled estates a benefit exceeding any share of portions which could come to him.

The point for my decision is one which in *Collingwood v. Stanhope* (1) appears to have been left open—namely, is a son to be regarded for the purpose of the exclusion clause as having or having had such a first estate in tail male as to disentitle him to a portion if he has by virtue of his estate disentailed the settled estates and resettled them to such uses as he and his father jointly appoint? Does it make

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(1) L. R. 4 H. L. 43.

(2) *Ibid.* 58.

(3) [1891] 3 Ch. 394.

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any difference whether and to what extent that power of appointment has been exercised, and, if exercised, whether the result of its exercise has been either to confer some benefit on the son in question or to affect in a manner adverse to his younger brothers the former limitations of the settled estates? Again, does it make any difference if, as may well happen, the son so disentailing obtains the benefit of a rent-charge immediately issuing out of the settled estates, or, as also may happen, if by consenting with his father to deal with the settled estates under and by virtue of his estate tail he obtains some extraneous or collateral advantage which may or may not be detrimental to his younger brothers? These are questions which must be borne in mind when it is sought to ascertain what is the principle on which a son is to be excluded from a portions provision. No question of accounting arises. A son either is or is not excluded; he cannot be included subject to his bringing into account sums which may be certain, or advantages which may be difficult to measure.

The conclusion to which I have come is that whenever a son, being entitled in remainder to an estate which, if it were an estate in possession, would exclude him from the portions provision, by virtue of that estate in remainder exercises dominion over and disposes of the settled property, he is at once, and for ever remains, excluded from the portions provision. It appears to me that it is not possible for the Court, in its desire to observe the principle by which it must be guided, to measure the benefit to himself or the detriment to others which the son so disentailing the settled property creates. In *In re Fitzgerald's Settled Estates*. *Saunders v. Boyd* (1) the result of a disentailing assurance and resettlement by one who was then the eldest son had been to give to him for his own benefit a sum equal to or more than his proper share of the portions fund, and on this ground Chitty J. held that, though he predeceased the tenant for life, his estate was not entitled to any further portion. As I read his judgment he expressly left open the question which I have to decide.

(1) [1891] 3 Ch. 394.

At least I find nothing in it which conflicts with the view which I have formed. There is a passage in Lord Westbury's speech in *Collingwood v. Stanhope* (1) which somewhat favours the same view, and in the speeches of Lord Colonsay and Lord Cairns I find the same indication, particularly in the speech of the latter, when he said, speaking of the elder son who had disentailed and joined with his father in resettling the estates (2): "He had so become entitled before the period of distribution; but it appears to me that that makes not the slightest difference. It was for him to consider whether he would leave his title as it then stood, or use that title for the purpose of creating a new devolution of the estates. He had become entitled to, and obtained the benefit of, the estates within the terms of the settlement." From an Irish case, *Rooke v. Plunkett* (3), I get further assistance. In that case the exclusion clause was in these terms: "Other than the son of the marriage who under the limitations of the settlement should become entitled to the lands." The eldest son of the marriage who would, had he survived his father, have become entitled in possession to an estate tail in the lands joined with his father in mortgaging the settled estates for certain sums, having, with the consent of his father as protector, disentailed the estates so far as might be necessary to make the mortgages effective. There was no evidence how much of the mortgage money the son received for his own benefit. He died a bachelor before his father. The question was whether his estate was entitled to any share of the portions fund. Sir Andrew Porter M.R. decided that his estate was not so entitled, and in the course of his decision made some observations which I would respectfully adopt. Dealing with the estate of the eldest son he pointed out that he became entitled on his birth to the vested estate tail and added (4): "It is clear, however, that this is not the sort of entitling that is meant. The words must be read as importing actual enjoyment of the property, and so equivalent

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(1) L. R. 4 H. L. 43, 59.

(2) *Ibid.* 63.

(3) [1902] 1 I. R. 299.

(4) *Ibid.* 308.

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to 'entitled in possession' or 'actually acquiring.' A mere title in remainder cannot be enough to exclude from the participation in the settled funds." It is clear from what follows that here the emphasis is on "mere"; for, after observing that the son must be taken to have received the mortgage moneys out of the estate, since whether he actually touched the money or not it could not have been charged on the inheritance without his positive act, the learned judge asked the question whether in the circumstances he had "become entitled" to the estate (a question not differing in my view from the question which I have to answer in this case—namely, whether Ralph Henry Leeke was entitled for an estate in tail male to the settled estates), and he answers it thus (*Rooke v. Plunkett* (1)) : "I have said that in one sense he certainly did. He became entitled to it in remainder. That, however, is not what is meant. Did he receive and enjoy it in possession? His estate in remainder did not vest in possession by the determination of the previous life estate; but he and the tenant for life opened the entail and enjoyed the inheritance just as they chose and without restriction save their own good pleasure." The learned judge went on to deal with the facts of that case, but in reference to the decision of Chitty J. in *In re Fitzgerald's Settled Estates. Saunders v. Boyd* (2) he significantly said (3) : "The learned judge does not decide that even a small or trifling encroachment upon the bulk of the estate would alter the result if once the entail is barred, so that it is in the power of the tenant in tail, with the concurrence of the protector, to dispose of the whole."

Consistently, then, with the Irish decision I here decide that Ralph Henry Leeke was entitled to the settled estates for an estate in tail male within the meaning of the exclusion clause, notwithstanding that his estate never vested in possession. The actual benefit which he himself received out of the estates may have been trifling. The actual detriment to the persons entitled in remainder after him may have been none. But, unless there can be, as I hold

(1) [1902] 1 I. R. 309.

(3) [1902] 1 I. R. 314.

(2) [1891] 3 Ch. 394.

there cannot be, some form of accounting between the parties, it matters not whether the benefit derived by the eldest son is equal to, or a little or much less than, the portion to which he would as a younger son have been entitled. In my judgment, there is no room for the nicely calculated less or more. It is sufficient that a son, being entitled in remainder to an estate tail, elects to take advantage of that estate and to make use of it for the purpose of dealing with the settled estates. What disposition he makes, what advantages he gains, either at once or subsequently by the exercise of a joint power, are, in my view, irrelevant. There must be a declaration accordingly. Costs as between solicitor and client to be paid out of capital moneys.

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Solicitors : *Metcalf, Hussey & Hulbert ; J. F. B. Satchell ; Preston, Lane-Claypon & O'Kelly.*

R. A. Y.

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May 26,
27, 28.

WHITE v. BIJOU MANSIONS, LIMITED.

[1936. W. 1461.]

Covenant—Restrictive covenants—Registered land—Entry on register of freehold title—Notice to lessees—Right to enforce covenant—Plaintiff not a grantee or covenantee named in conveyance containing covenant—Change in neighbourhood—No acquiescence—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 44, sub-s. 5; s. 56, sub-s. 1—Land Registration Act, 1925 (15 Geo. 5, c. 21), ss. 20, 50, 52.

In 1886 the owners of a freehold estate in London entered into a contract to sell it to builders, and part of the property was conveyed by the owners and builders to a purchaser F., who covenanted to build a house thereon and to use it only as a private residence, subject to certain stipulations. The vendors entered into reciprocal covenants with F. that every building lease or other assurance of the rest of the estate should contain covenants on the part of the purchaser or lessee with the builders (inter alia) to use the land for the purpose of a private dwelling-house only. The plaintiff derived title under the conveyance to F. and a similar deed executed in 1887.

In 1890 the same vendors conveyed adjoining land to a purchaser N., who entered into covenants with the owners and the builders and their assigns, similar to those contained in the conveyance of 1886, to build a house thereon to be used as a private dwelling-house only. Ultimately this land and the house built upon it became vested in P. in fee. In 1935 P. was registered at the Land Registry as proprietor of the freehold with an absolute title. The last mentioned covenant was entered upon the charges register. P. granted a lease of the premises for a term of twenty-eight years to lessees, who afterwards assigned it to the defendants. The lease contained a covenant by the lessees not to use the premises for any purpose other than a private dwelling-house or private suites or flats. The defendants had no actual notice of the covenant on the registered title. The plaintiff brought the action to restrain the defendants from committing a breach of the covenant on the charges register by converting the house into a set of private suites:—

Held, (1.) that under s. 50, sub-s. 2, of the Land Registration Act, 1925, the defendants, as persons deriving title under P., were affected with notice of the covenant entered on the register and were bound by it, (2.) that the plaintiff was not a person entitled to the benefit of the covenant under s. 56, sub-s. 1, of the Law of Property Act, 1925, or otherwise, and could not enforce it, and (3.) that on the facts the defence of acquiescence by the plaintiff in changes which had taken place in the neighbourhood, failed. The action, having failed on the second ground, was dismissed.

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THE facts, as stated by the learned judge in his judgment, were as follows : The plaintiff is the owner of the freehold of a house, No. 16, Palace Court, deriving his title as to the greater part of those premises from a deed of December 17, 1886, and as to some small part from a later deed of May 3, 1887. From those deeds it appears that the freeholders of a substantial piece of land known as the Shaftesbury House Estate—namely, a Mr. Alexander Chorley Davidson and a Miss Maria Louisa Davidson—had entered into an agreement (dated June 12, 1886) with two persons of the name of Daw for the sale to them of that piece of land for a sum of 55,000*l.* It appears by another agreement recited in the same deed that the Daws had agreed to sell to one James Israel Fellows a part of that larger plot for 6700*l.*, and the conveyance of December 17, 1886, was entered into for the purpose of giving effect to that second agreement. The parties to that deed were the Davidsons, the Daws and Mr. Fellows.

By the deed the property in question was conveyed in fee simple to Mr. Fellows and the parties entered into certain covenants to which I will now refer. First of all, the purchaser, Mr. Fellows, entered into a covenant with the Daws that he would build a dwelling-house for 4000*l.* and that he would use it for a private residence and for no other purpose except for the residence and place of practice of a medical man, subject to certain stipulations. The Daws and each of them covenanted with Fellows in these terms : “ For themselves their heirs executors administrators and assigns and each of them for himself his heirs executors administrators and assigns with the intent to bind themselves and all other persons in whom the residue of the land called the Shaftesbury House Estate comprised in and delineated on the plan annexed to the said agreement of the 12th day of June, 1886, shall for the time being be vested but not so as to make themselves personally liable under this covenant in respect of any part or parts of the same land after they the said

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covenanting parties respectively have ceased to be owners or owner thereof do and doth hereby covenant with the said James Israel Fellows his heirs and assigns that every building lease or other assurance of any part or lot of the said Shaftesbury House Estate (other than the part hereby granted) shall contain covenants or conditions on the part of the purchaser lessee or owner of the property," with the Daws, among other things, to use the land for the purpose of a private dwelling-house only; and, further, as a complement to that covenant, the Daws entered into a similar obligation in respect of the land so long as it should remain in their own ownership. That was the deed under which the plaintiff derived title. He is now the owner of 16, Palace Court, and has, I think, caused himself to be registered with absolute title.

The defendants, Bijou Mansions, Ltd., are lessees of the adjoining property, No. 18, Palace Court. The title to that property is as follows. It appears that by a conveyance dated some four years after the earlier conveyance—namely, on May 2, 1890—and made between the Davidsons of the first part, the Daws of the second part and one Nicholson, the purchaser, of the third part, that property was conveyed to Nicholson, the purchaser, subject to a certain covenant into which he entered. The covenant was a covenant by the purchaser for himself, his heirs, executors, administrators and assigns with the intent to bind himself and his successors in title and the owner for the time being of the property thereby conveyed with the Davidsons, their heirs and assigns, that the piece of land thereby conveyed should, among other things, be used for the purpose of a private dwelling-house only. The purchaser further covenanted for himself, his heirs, executors, administrators and assigns to the intent that the covenant should be binding on him and his successors in title and the owner for the time being of the piece of ground and premises thereby conveyed with the vendors, that is to say, the Daws, and their heirs, executors, administrators and assigns that the purchaser would build a certain building on the land conveyed and similarly entered into a covenant with

them that the premises so erected should be used as a private dwelling-house only. SIMONDS J.

That land and the building on it, No. 18, Palace Court, in due course came into the ownership of one Irene Plumbly, who was duly registered under the Land Registration Act, 1925, with an absolute title, and the only incumbrance on the charges register to which I need refer is the covenant which I have just stated. Being so registered as the absolute proprietor, Miss Plumbly, on April 16, 1935, granted to two ladies, Miss Powell and Miss Flores, a lease of No. 18, Palace Court, for a term of twenty-eight years from March 25, 1925, at a certain rent. That lease contained a covenant on the part of the lessees that they would not use or permit to be used the demised premises or any part thereof for any purpose other than a private dwelling-house or for private suites or flats, and there was a provision that no part of the premises should be used as a surgery or place for dispensing medicine of any medical man residing on the premises, and so on. That lease was in due course assigned to the defendant company. It will be observed that the terms of the covenant in the lease do not agree with the terms of the restriction imposed on the freehold. The leaseholders or their assigns have availed themselves of the permission, if it can be so described, contained in their lease and they have done that which their lease permitted them to do, but which the restrictions on the freehold did not permit, that is, they have used the premises and intend to use them otherwise than for a private dwelling-house only.

The plaintiff commenced this action for an injunction to restrain the defendants from committing a breach of the covenant on the charges register of the freehold title, by converting the house into a number of private suites or "flatlets."

Alexander Grant K.C. and *Roger Turnbull* for the plaintiff. The defendants are bound by the restriction. Any person who takes a lease from a registered proprietor takes it subject

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to and with notice of any restrictive covenant entered on the register. Land Registration Act, 1925, s. 50. (1) The defendants suggest that if a freeholder grants a lease which does not contain the covenants subject to which the freehold was conveyed, the lessee, having no notice of it, is freed from the covenant under s. 44, sub-s. 5, of the Law of Property Act, 1925. (2)

[SIMONDS J. The section suggests that in certain events a purchaser is not to be affected with notice, even if he has actually had notice.]

The object of the section was to abolish the rule laid down in *Patman v. Harland* (3) that a lessee, though he could not call for his lessor's title was nevertheless affected with notice of any covenant or restriction in that title. But a lessee of registered land takes the land subject to incumbrances appearing on the register: Land Registration Act, 1925,

(1) The Land Registration Act, 1925, provides as follows :—

Sect. 50: "(1.) Any person entitled to the benefit of a restrictive covenant or agreement (not being a covenant or agreement made between a lessor and lessee) with respect to the building on or other user of registered land may apply to the registrar to enter notice thereof on the register, and where practicable the notice shall be by reference to the instrument, if any, which contains the covenant or agreement, and a copy or abstract of such instrument shall be filed at the registry; and where any such covenant or agreement appears to exist at the time of first registration, notice thereof shall be entered on the register. In the case of registered land the notice aforesaid shall take the place of registration as a land charge.

(2.) When such a notice is entered the proprietor of the land

and the persons deriving title under him (except incumbrancers or other persons who at the time when the notice is entered may not be bound by the covenant or agreement) shall be deemed to be affected with notice of the covenant or agreement as being an incumbrance on the land."

(2) The Law of Property Act, 1925, provides :—

Sect. 44, sub-s. 5: "Where by reason of any of the last three preceding subsections, an intending lessee or assign is not entitled to call for the title to the freehold or to a leasehold reversion, as the case may be, he shall not, where the contract is made after the commencement of this Act, be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice."

(3) (1886) 17 Ch. D. 353.

s. 20. (1) This section takes effect independently of notice. See also s. 52. (2)

The defendants' predecessor in the deed of May 2, 1890, covenanted with the assigns of the Davidsons and of the Daws. The plaintiff is a successor in title to Fellows, who was such an assign, and he can take the benefit of the covenant although he was not a party to the deed: Law of Property Act, 1925, s. 56. (3) See *In re Ecclesiastical Commissioners for England's Conveyance* (4); *Ives v. Brown*. (5)

[SIMONDS J. referred to *Dyson v. Forster* (6) and s. 5 of the Real Property Amendment Act, 1845.]

The covenants are mutual covenants for the benefit of the Shaftesbury House Estate, and they bind the assigns of the land conveyed.

R. F. Roxburgh K.C. and *W. F. Waite* for the defendants. This action raises three different points: (1.) whether the

(1) The Land Registration Act, 1925, provides as follows:—

Sect. 20: “(1.) In the case of a freehold estate registered with an absolute title, a disposition of the registered land or of a legal estate therein, including a lease thereof, for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple or the term of years absolute or other legal estate expressed to be created in the land dealt with, . . . subject—

(a) to the incumbrances and other entries, if any, appearing on the register; and

(b) unless the contrary is expressed on the register to the overriding interests, if any, affecting the estate transferred or created, but free from all other estates and interests whatsoever, including estates and interests of His Majesty. . . .”

(2) Sect. 52: “A disposition by the proprietor shall take effect subject to all estates, rights, and claims which are protected by way

of notice on the register at the date of the registration or entry of notice of the disposition, but only if and so far as such estates, rights, and claims may be valid and are not (independently of this Act) overridden by the disposition.

(2.) Where notice of a claim is entered on the register, such entry shall operate by way of notice only, and shall not operate to render the claim valid whether made adversely to or for the benefit of the registered land or charge.”

(3) Sect. 56, sub-s. 1: “A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.”

(4) [1936] Ch. 430.

(5) [1919] 2 Ch. 314.

(6) [1909] A. C. 98.

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plaintiff is entitled to the benefit of this or some other covenant; (2.) whether the defendants are subject to the burden of this or some other covenant; and (3.) whether, if the answer to both questions is in the affirmative, there is an equitable defence to the action.

As to (1.) the only covenant of which the defendants have notice is the covenant on the register, and no other. The agreement of 1836 is not part of their title and is no evidence against them. The only covenant admissible in evidence against them is the covenant on the registered title. The decision in *In re Ecclesiastical Commissioners for England's Conveyance* (1) is quite distinguishable on the facts: see pp. 438, 440. There it was provided that the owners of adjoining and adjacent land should be entitled to the benefit of the covenants; here the benefit of the covenant is not annexed to any particular land: see also *In re Sunnysfield*. (2) The covenant, to be enforceable, must be annexed to and expressed to be for the benefit of a particular area of land. In *Kelsey v. Dodd* (3) Jessel M.R. said that s. 5 of the Act of 1845 got rid of the objection which would arise from a man not being made a party, but it did not get rid of the objection to a non-existing party. It did not enable a person not in existence at the time to sue. A contract is an "instrument" within s. 56, but the definition in s. 205, sub-s. 1 (viii.), of the Law of Property Act, 1925, of "instrument" excludes a statute.

It is essential to put on the register the covenants to be enforced, though the names of the parties entitled to enforce those covenants need not be inserted. The only covenants on the register are those contained in the conveyance of 1890 and entered into by Davidsons the freeholders and Daws the builders. These covenants could not possibly run with the land. (The benefit of the covenant cannot be annexed to land which is not sufficiently defined. A person who takes his assignment prior to the date of a covenant cannot be an assignee of the benefit of the covenant)

(1) [1936] Ch. 430, 438, 440. (3) (1883) 52 L. J. (Ch.) 34, 39.

(2) [1932] 1 Ch. 79.

The object of s. 5 of the Real Property Amendment Act, 1845, was to abolish the technical rule of common law under which a person not a party to an indenture as distinguished from a deed poll could not take any immediate interest under it, though a remainder in his favour could always be created. The draughtsman of the Law of Property Act, 1925, in s. 56 used the same words in their re-enactment, but ignored the particular meaning of the earlier statute, the feature of which was the use of the word "indenture." Apart from the later extension to personalty, the meaning of the sections in the two Acts is the same. A person cannot claim to be entitled to the benefit of a covenant under s. 56 merely because it has turned out that it happens to be for his benefit: see *Forster v. Elvet Colliery Co., Ltd.* (1); *Dyson v. Foster* (2); *Grant v. Edmondson* (3); *Drake v. Gray*. (4) (The cases which support the doctrine that a person not a covenantee can enforce a covenant are only those where (1.) the covenant is annexed to the land ab initio, and (2.) the person who takes the benefit of the covenant has annexed it to the land by a subsequent conveyance: see *In re Union of London and Smith's Bank, Ltd.'s Conveyance*. *Miles v. Easter* (5), per Romer L.J., referring to *Renals v. Cowlishaw*. (6))

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On the question of notice, we have no notice of the covenant in the conveyance of 1886. The defendants' land is registered with an absolute title, and the position is governed by s. 5 of the Land Registration Act, 1925. It is admitted that if this had been unregistered land the defendants would have had no notice of the covenant sought to be enforced: the only question is whether a different rule is applicable because the title is registered. The Law of Property Act, 1925, s. 44, sub-s. 5, shows clearly that the defendants are not affected by constructive notice, and there is no exception of registered land in this section.

The third set of defences is of an equitable nature. Assuming that the plaintiff is entitled to enforce the covenant, and that

(1) [1908] 1 K. B. 629.

(2) [1909] A. C. 98.

(3) [1931] 1 Ch. 1, 27, 28.

(4) [1936] Ch. 451.

(5) [1933] Ch. 611.

(6) (1878) 9 Ch. D. 125.

SIMONDS J. the defendants are bound by it, they ask for relief under s. 50, sub-s. 3, of the Land Registration Act, 1925.

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The plaintiff is seeking to enforce the whole covenant ; he, though subject to a similar covenant, has since 1929 been using his own house otherwise than as one private dwelling-house, having converted it into flats.

[*Grant K.C.* The plaintiff invited the defendants to apply to the County Council for an order under the Housing Act, 1925, modifying the restrictive covenants, and said he would not oppose, but the defendants refused to do so.]

This house has been used as a boarding-house for a long time, and conversion into flatlets has effected no material change in the user. The only difference is that each bedroom has its own bathroom and lavatory. Changes in the character of the neighbourhood which have been brought about by or at any rate with the acquiescence of the plaintiff and his predecessors in title render it inequitable to enforce this covenant : see *Chatsworth Estates Co., Ltd. v. Fewell*. (1) The covenants have never been properly enforced and are now pecuniarily valueless : see *Bedford (Duke) v. British Museum Trustees* (2) ; *Sayers v. Collyer*. (3)

Grant K.C. in reply. Sect. 52, sub-s. 1, of the Land Registration Act, 1925, does not modify s. 20 in any way. The Law of Property Act, 1925, s. 44, sub-s. 5, has nothing to do with registered land as such. The lessee takes subject to incumbrances which appear on the register. The original covenants show an intention to create rights and obligations, the benefit of which could be expressly or impliedly transferred to other persons interested in the land : *Elliston v. Reacher*. (4) The present is a case where a previous purchaser has entered into a restrictive covenant, on the faith of which he got a restrictive covenant when he sold his land. The conveyance of 1886 is the common source of the plaintiff's and the defendants' titles.

SIMONDS J. [after stating the facts as above :] The first question for my consideration, which is said to be one of

(1) [1931] 1 Ch. 224, 230.

(3) (1884) 28 Ch. D. 103.

(2) (1822) 2 My. & K. 552.

(4) [1908] 2 Ch. 374, 665.

considerable importance as a matter of conveyancing, is whether the lessees, having, as I hold they have, no actual notice of the restriction on the freehold, are bound by the restriction which has been so imposed on it. That is the first question which I have to decide.

The second question is one also I think of some difficulty and importance. Assuming that the lessees are under a liability in respect of that restrictive covenant, can the plaintiff here sue ; that is to say, is he a person who is entitled to the benefit of that covenant so as to enable him to maintain this action ?

Thirdly, and this is a point on which some evidence has been given, assuming that the defendants are under a liability, and assuming further that the plaintiff is in a position to enforce it, is there available to the defendants any equitable defence based on a change in the character of the neighbourhood, or the conduct of the plaintiff himself, with regard to the adjoining property ?

(1) The first question, then, is whether the lessees or their assigns, having, as I hold, no actual notice of the encumbrance, the restrictive covenant, are nevertheless thereby bound. The position with regard to that appears to me to be this. Before the Law of Property Act, 1925, at any rate with regard to unregistered land, the law was that a lessee, though he had no right to call for his lessor's title, yet had constructive notice of it so that his leasehold interest was subject to the restrictions which affected the freehold. That rule, sometimes known as the rule in *Patman v. Harland* (1), has in the case of unregistered land been abrogated by s. 44, sub-s. 5, of the Law of Property Act, 1925. That statement must be taken subject to this qualification, that s. 198 of the same Act must be considered, and that section appears, notwithstanding the unqualified language of s. 44, sub-s. 5, to affect a lessee with notice of all those charges which are registered under the Land Charges Act, 1925. The measure of protection which is thereby afforded to the freeholder or to the lessee it is not necessary for me to consider.

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But whatever may be the position with regard to unregistered land, a wholly different question arises in respect of registered land, and for the purpose of considering whether the lessee of registered land is affected with notice of a registered incumbrance it is necessary to consider, and, as I think, to consider only, the language of the Land Registration Act, 1925. That Act supplies a code for registering land and for disposing of it by grant, charge or lease when it is registered. When the proprietor has been registered as the owner of a freehold estate with an absolute title and has under s. 18 made such a grant as is contemplated by sub-s. 1 (e) of that section—namely, has granted a lease of the registered land, and the lease has been in its turn duly registered, then the lessee acquires a leasehold interest under s. 20, sub-s. 1, and the nature of that leasehold interest is stated in unequivocal language in the section. It is an interest which is subject “to the incumbrances and other entries, if any, appearing on the register,” and, “unless the contrary is expressed on the register, to the overriding interests, if any, affecting the estate transferred or created,” but free from all other estates and interests whatsoever. No language can be more clear to define both the liability to which the registered leaseholder is subject and the measure of the freedom which he enjoys, and it is to be observed that there is no sort of qualification such as is to be found in s. 52, sub-s. 1, to which I will presently refer. Just as s. 20 states the position of the registered grantee, including a lessee, in respect of incumbrances and other interests, including of course a restrictive covenant, so s. 50 states the position of the person who is entitled to the benefit of the incumbrance or restrictive covenant, whatever it may be. Sect. 50 provides for an application being made by the person entitled to the benefit of a restrictive covenant to enter notice thereof on the register. Sub-s. 2 provides: “When such a notice is entered the proprietor of the land and the persons deriving title under him . . . shall be deemed to be affected with notice of the covenant or agreement as being an incumbrance on the land.” There is no exception to that except that which is expressly stated in the

sub-section—namely, “Incumbrancers or other persons who at the time when the notice is entered may not be bound by the covenant or agreement.” That section appears to me to be the proper complement to s. 20, and so far it appears to me to be clear beyond all doubt that (when an incumbrance has been registered on the register it is notice to all persons deriving title from the proprietor, though it may be perhaps a blot, that the lessee, unless he makes some bargain to that effect, is not permitted to inspect the register.) The answer is: He is at liberty, if he thinks fit, to make such a bargain and to refuse to enter into any contract or lease unless first he obtains the permission of the lessor, who can grant it to him, to inspect the register.

That being the position so far under the Act I come now to s. 52, on which counsel for the defendants has relied for his proposition that he takes without being subject to this incumbrance. Sect. 52, which is in the same fasciculus of clauses as s. 50, provides: “A disposition by the proprietor shall take effect subject to all estates, rights, and claims which are protected by way of notice on the register at the date of the registration or entry of notice of the disposition, but only if and so far as such estates, rights, and claims may be valid and are not (independently of this Act) overridden by the disposition.” The argument, if I understand it rightly, is this. It is said that the disposition—namely, the lease—does override the incumbrance, the restrictive covenant, of which notice has been entered on the register. The argument proceeds thus. It is said that the intending lessee was not entitled to call for his lessor’s title; therefore, under s. 44, sub-s. 5, of the Law of Property Act, 1925, he is not affected by the incumbrances; and therefore the disposition to him overrides that. It is a highly ingenious way of looking at the section, but I decline to give that effect to it. It appears to me that adequate effect can be given to these words by regarding them as applicable to a case where the disponent, the proprietor, in exercise of some statutory power, for instance, as tenant for life under the Settled Land Act, is competent to make a disposition of the property which will

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override estates and interests which are nevertheless properly entered on the register. I decline to give to s. 52 a meaning which would impose so grave a qualification upon the words of s. 20.

I hold, accordingly, on the first issue in this case that the defendants, who are the lessees, take subject to the obligations imposed by the covenant of which notice is entered on the register. But if they take subject to that incumbrance they take subject to that alone. I cannot accede to the argument which has been put forward on behalf of the plaintiff that in addition to that incumbrance there is some other equitable obligation arising from the application of the doctrine of derogation from grant which affects the property in the hands of the lessees. There is no notice of such an equitable obligation on the register and it appears to me that I have no right to charge the lessee with notice of any such equitable obligation any more than I would have the right to charge him with notice of some express covenant which had not been entered on the register. Therefore I proceed to examine the case on the footing that the lessee is affected by notice of this covenant and by no other.

Then the question arises: Can the plaintiff here enforce that covenant? I turn to look at it once more. There are covenants entered into in the year 1890, the first with the Davidsons, the second with the Daws, and they are covenants which are not annexed to any particular parcel of land. They are covenants entered into four years after the plaintiff acquired the title to his land. They are covenants the benefit of which has not, expressly or by implication, or in any manner whatsoever, been assigned to the plaintiff, and it appears to me to be quite impossible, apart from any building scheme or from the special statutory provision to which I shall presently refer, that the plaintiff can avail himself of this covenant and enforce it. There is here no question of a building scheme. That question was not raised in the pleadings and although at a late stage, indeed in the course of his reply on the case, Mr. Grant invited me to allow an amendment so that the issue of a building scheme might be

raised, I did not think fit at that stage to allow such an amendment. There is therefore no question of a building scheme.

It remains to consider the only other ground on which, as it appears to me, Mr. Grant can possibly rest his case. He claims that he is entitled to enforce this covenant, entered into on May 2, 1890, on the ground that either under s. 5 of the Real Property Act, 1845, or under s. 56 of the Law of Property Act, 1925, that right is conferred on him. In the view which I take of both these sections it is unnecessary for me to consider whether he is in any way entitled to call in aid s. 56 of the Act of 1925, with regard to covenants or agreements contained in a deed executed in 1890. It is necessary for me to say something about the earlier section before I come to consider the later section.

Sect. 5 of the Real Property Amendment Act, 1845, which was, as its title suggests, an Act to amend the law of real property, was aimed at remedying certain mischiefs in the state of the common law as it then was. There was a highly technical and artificial rule that by an indenture, as distinguished from a deed poll, an immediate interest in land could not be granted in favour of a grantee unless that grantee was a party to the deed. That mischief this section was designed to remedy. Further, there was the defect, as it was supposed, in the common law, that a person could not take advantage of a covenant in a deed unless he was a party to the deed. Be it observed that the Act of 1845 dealt with real property. This section was confined to the case of an indenture, and of an immediate interest created by that indenture, for it was never the law that an estate in remainder could not be validly granted in favour of a grantee if he were not a party. Indeed the common form of settlement then for centuries in vogue had limited estates in remainder not only to persons not parties to the deed but to persons not yet in existence.

Accordingly, s. 5 of the Act of 1845 provided that under an indenture executed after October 1, 1845, an immediate estate or interest in any tenements or hereditaments and the

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benefit of a condition or covenant in respect of any tenements or hereditaments may be taken although the taker thereof be not named a party to the same indenture. I think the important aspect of that section for my present purpose is this. [It appears to me to be quite plain that the section has a limited operation. It is intended to confer a benefit only on those persons to whom the deed purports to grant an estate or interest or those persons with whom there purports to be a covenant or agreement.] It is impossible, in my view, to regard this section as creating a benefit in favour of any persons who may like to avail themselves of it and say: "If we can take advantage of this it will be for our benefit." It seems to me clear that this section was intended merely to provide that A.B., the grantee under a deed, might take an immediate interest although he was not a party, and similarly that A.B., with whom the covenant was purported to be made by the deed, should be able to avail himself of it although he was not a party to the deed, and in the few cases which have arisen under this section since 1845—and there appear to be very few—it will be found in every case where it has been applied that it has been in favour of a person who although not a party to the deed was a person to or with whom a grant or covenant purported to be made. That was the position under the Act of 1845.)

I now turn to consider s. 56 of the Act of 1925, which, it is said, however inaptly, takes the place of the earlier section. Sect. 56 of the Law of Property Act, 1925, provides as follows: "(1.) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument." I think many difficulties may well arise on that section which do not fall to me to-day to solve. It appears to one at once that, so far as any other than an immediate interest in land is concerned the section is superfluous, because a person always could take another interest in land though not a party. It is at least a question how far such a provision is necessary at all in the

case of personalty. Without deciding it, I should be disposed to think that equitable estates even in land were not subject to the old artificial rule and it is very doubtful if an interest in personalty was ever so subject. However that may be, for the purposes of the present case I think I am only concerned with one aspect of this question. Just as under s. 5 of the Act of 1845 only that person could call it in aid who, although not a party, yet was a grantee or covenantee, so under s. 56 of this Act only that person can call it in aid who, although not named as a party to the conveyance or other instrument, is yet a person to whom that conveyance or other instrument purports to grant some thing or with which some agreement or covenant is purported to be made. (To give it any other meaning appears to me to open the door to claims or assertion of rights which cannot have been contemplated by the Legislature, for if that be not the limitation which must be imposed on this section it appears to me that there is no limit and it will be open to anybody to come into Court and say: "Here is a covenant which if enforced will redound to my advantage, therefore I claim the benefit of the section. I claim that this covenant or condition is one which should be enforced in my favour because it is for my benefit, whether intended for my benefit or not intended for my benefit would not appear to matter." I cannot give to the section any such meaning as that. I interpret it as a section which can be called in aid only by a person in whose favour the grant purports to be made or with whom the covenant or agreement purports to be made. If that is so, whether the plaintiff's claim arises under the earlier or the later Act, he cannot sue on it in this Court because he is not a person who, under the deed of 1890, can point to any grant or any covenant purported to be made to or with him. That is the construction which I place on s. 56, with the result that the plaintiff's claim must fail.

I will only add on this branch of the case that my judgment coincides with the expression of opinion by Luxmoore J. in *In re Ecclesiastical Commissioners for*

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SIMONDS *England's Conveyance*. (1) Although the learned judge
J. appears not to have had to consider the exact point which
1937 Mr. Grant has argued to-day, it is, I think, implicit in his
WHITE decision, particularly in a passage (2) beginning "What it
v. is necessary to consider is the true construction of the
BIJOU conveyance of April 21, 1887, in order to ascertain whether
MANSIONS. any persons, not parties thereto, are described therein as the
LD. covenantees, and whether such covenants are expressed to
affect any and what hereditaments," that the view which I am
taking of the section is one which he also took.

Holding as I do on the second point, that although the defendants took this lease subject to the registered incumbrance the plaintiff is himself not in a position to enforce it, the further question raised by the defence becomes really unnecessary for me to pursue. It is, however, right that I should just say this, that it is clear to me on the facts, first, that although there may have been some changes in the neighbourhood, as there undoubtedly were, yet they were not changes for which the plaintiff himself was substantially responsible. Secondly, I think the evidence sufficiently shows that it remains a matter of real importance to the plaintiff that the covenants contained in the deed of 1890 should be observed, and the evidence of Mr. Cocks satisfied me that it is a matter of importance to him that the neighbouring house, No. 18, Palace Court, should not be used for the purpose for which it is intended to use it. It may be that at any particular time the user is not detrimental, that it does not cause an annoyance to anybody, but he satisfied me as a general proposition that it is depreciatory of property that the adjoining property should be used for the purpose for which it is intended to use No. 18. And when he told me that he would never advise the Cadogan Estate, for which he acts, to permit such user of property adjoining other superior flat property or, I suppose, private houses, that appeared to me to be cogent evidence that it is of importance to the plaintiff that this user should not be allowed. A number of details were gone into and a number of questions

(1) [1936] Ch. 430.

(2) Ibid. 438.

of some importance were ventilated, but taking the view which I do on the first and second questions, I think it is unnecessary for me to say more than that in my view, if it is necessary to decide it, the defendants fail on this point. Taking the view which I do on the second point I must dismiss the action, with costs.

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Solicitors : *T. & N. Blanco White ; Laytons.*

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BYNOE *v.* GENERAL FEDERATION OF TRADE
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[1936. B. 3409.]

Insurance (National Health)—Dental benefit—"Dentist"—Medical Practitioner not on dentists' register—Treatment of insured person—No right to payment for treatment from approved society—Dentists Act, 1878 (41 & 42 Vict. c. 33), ss. 3, 6—Dentists Act, 1921 (11 & 12 Geo. 5, c. 21), s. 1—National Health Insurance Act, 1924 (14 & 15 Geo. 5, c. 38), ss. 22, 75, 93—National Health Insurance Act, 1928 (18 & 19 Geo. 5, c. 14), s. 16, sub-s. 3—National Health Insurance (Dental Benefit) Regulations, 1930, regs. 2, 21.

A registered medical practitioner, although entitled to practice dentistry under s. 1, sub-s. 3, of the Dentists Act, 1921, is not entitled to give dental treatment to a patient insured under the National Health Insurance Acts, 1924 to 1928, for which fees can be charged to and payment demanded from the patient's approved society under the National Health Insurance (Dental Benefit) Regulations, 1930, unless he is a dentist registered in the dentists' register kept under the Dentists Act, 1878. These regulations, having been approved after being laid before Parliament, have the same effect as if they had been enacted in an Act of Parliament.

ACTION.

The plaintiff claimed an injunction to restrain the defendants from writing, publishing or uttering any letter, document, publication or words to the effect or implying that the plaintiff was not a person entitled to give dental services and to receive in respect thereof payment from the defendants or any other person under reg. 21 of the National Health Insurance (Dental Benefit) Regulations, 1930, or under the National Health Insurance Acts, 1924 to 1928. The defendants denied that the plaintiff was a "dentist" within the meaning of these regulations.

The plaintiff was a duly qualified and registered medical practitioner, but was not registered as a dentist in the dentists' register established by the Dentists Act, 1878. He claimed, however, to be a dentist prepared to supply dental treatment to insured persons at scale fees, and in or about February, 1935, he supplied dental treatment to one W. J. Evans, a member of the defendant society, and afterwards sent in an

account of his charges for the treatment amounting to 1*l.* 12*s.* 6*d.* to the defendants, on a prescribed form known as a "dental letter." The defendants did not pay the charges, and on February 6, 1935, they wrote to Evans saying that they had received the estimate for his dental treatment, but could not pay the charges or deal with the dental letter, on the ground that the plaintiff's name was not on the dentists' register. They suggested that Evans should obtain an estimate from another dentist on the register, and another dental letter. The plaintiff alleged that this letter of the defendants implied that he was not qualified to give dental services and to obtain payment therefor from the defendants.

The National Health Insurance (Dental Benefit) Regulations, 1930 (Stat. Rules & Orders, 1930, No. 1060), made under the National Health Insurance Acts, 1924 to 1928, provide—

Reg. 2: "'Dental benefit' means the additional benefit numbered 9 in the Third Schedule to the Act.

'Dentist' means a person who is duly registered in the dentists' register kept under the Dentists Acts, 1878 to 1923, or any Act amending those Acts.

Reg. 21 (1.): Subject to the provisions of these Regulations a member shall be entitled to obtain dental treatment from any dentist who is prepared to provide such treatment at fees not exceeding those set out in the Second Schedule to these regulations (hereinafter referred to as the "scale fees") not being a dentist who is for the time declared by the Minister to be unsuitable for service in connection with dental benefit as the result of an inquiry. . . ."

It was not suggested that the plaintiff had at any time been declared unsuitable for service in connection with dental benefit.

The form of "dental letter" is set out in the Third Schedule to the regulations.

The material provisions of the Dentists Acts, 1878 and 1921, and the National Insurance Acts, 1924 and 1928, are set out in the judgment of the learned judge.

Archibald Pocock for the plaintiff. The fact that the plaintiff

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is not actually registered as a dentist in the dentists' register is not material, as he is entitled to practice dentistry and to call himself a dentist under s. 6 of the Dentists Act, 1878, and under s. 1, sub-s. 3, of the Dentists Act, 1921. The plaintiff comes within reg. 21 of the Dental Regulations, 1930. He is entitled under the Acts to be registered as a dentist, and if he is not a "dentist" within the meaning of reg. 2, then the regulations are not within the Act, and to that extent are ultra vires and void. See *Institute of Patent Agents v. Lockwood*. (1) The present case does not go so far as *Lockwood's* case. (1) Here the general power to make regulations is contained in the National Health Insurance Act, 1924. It is necessary to give full effect to the proviso, and not to restrict any right already given. A person to whom a patient can properly go to obtain dental treatment is a "dentist" within the Dentists Acts, and must therefore be treated as a dentist for the purposes of the National Health Insurance Acts and the Dental Regulations made under them. [*Minister of Health v. The King. Ex parte Yaffe* (2) was also referred to.]

Grant K.C. and *A. de W. Mulligan* for the defendants were not called upon.

SIMONDS J. In this case the plaintiff is a legally qualified and registered medical practitioner. The defendants, the General Federation of Trade Unions Approved Society, are an approved society within the meaning of the National Health Insurance Acts, 1924 to 1932, and of that society a Mr. W. J. Evans was, in January and February, 1935, and at all material times, a member. In the course of those months the plaintiff gave dental treatment to Mr. Evans and, having given that dental treatment, sent an account of his charges, amounting to *1l. 12s. 6d.*, to the defendant society on the prescribed form known as the "dental letter." The defendant society refused to pay those charges. They wrote to Mr. Evans the following letter dated February 6, 1935: "We have received an estimate from Mr. C. A. Bynoe"—that is, the plaintiff—"in respect of

(1) [1894] A. C. 347.

(2) [1931] A. C. 494.

you. We desire to state, however, that Mr. Bynoe's name does not appear on the dentists' register and this we have confirmed with the Dental Board. We are therefore unable to deal with the dental letter. We are enclosing a duplicate dental letter and if you care to visit another dentist and obtain an estimate and send same in to us, we shall be pleased to give your case further consideration."

The plain meaning of that letter was this, that the plaintiff was not a person who was entitled to give dental treatment under the National Health Insurance Acts and the regulations made thereunder, and the question which I have to determine is, in effect, whether a person who is not a dentist in the sense that he is not on the dentists' register is a person who, under the National Health Insurance Acts and the regulations made thereunder, is entitled to give dental treatment and to receive payment from approved societies in respect of that treatment.

The dentists' register is a register established under the Dentists Act, 1878. By s. 3 of that Act a penalty was imposed on unregistered persons using the title of "dentist." A register was established, and by s. 6 of the Act the following were qualified for registration: first, a licentiate in dental surgery or dentistry of any of the medical authorities; secondly, a person who was entitled to be registered as a foreign or colonial dentist; and, thirdly, a person who was at the passing of the Act "bona fide engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine, surgery, or pharmacy." Those three classes of persons were entitled to be registered under the Act, that is to say, to have their names put on the dentists' register.

In 1921 it was further provided, by s. 1 of the Dentists Act, 1921, that no person should, unless he was registered in the dentists' register under the Dentists Act, 1878, "practise or hold himself out, whether directly or by implication, as practising or as being prepared to practise dentistry." But by sub-s. 3 it was provided that nothing in that section should operate to prevent "(a) the practice of dentistry by a registered medical practitioner."

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The result of those Acts is this, that the plaintiff, being, as it is admitted, a qualified medical practitioner, is entitled to practise dentistry though he is not on the dentists' register.

I now turn to the legislation dealing with National Health Insurance. The National Health Insurance Act, 1924 (I need refer to a very few sections only), provided by s. 22 for approved societies, as defined by the Acts, making "rules with regard to the manner and time of paying or distributing and the mode of calculating benefits." Sect. 24 dealt with the administration of what is called "medical benefit," that is to say, the setting up of a panel of doctors who would give their services for the purposes of those persons who were entitled to relief under the Act. Sect. 74 provided for a valuation of the assets and liabilities of approved societies. Sect. 75 made provision for the application of any surplus on a valuation of those assets and liabilities, and provided, among other things, that if there were a surplus a scheme for additional benefits among the members should be established. I think that the last matter to which I need refer in the Act of 1924 is that s. 93 dealt with the making of regulations and orders. By sub-s. 1: "Regulations may be made under this Act for any of the following purposes; that is to say: (a) for any purposes for which regulations are expressly authorized to be made by any of the provisions of this Act; (b) for prescribing anything which under this Act is to be prescribed; and (c) generally for carrying this Act into effect." Then by sub-s. 2 it was provided: "All regulations made under this Act shall be laid before both Houses of Parliament as soon as may be after they are made, and shall have effect as if enacted in this Act, and if an address is presented to his Majesty by either House of Parliament within the next subsequent 21 days on which that House has sat next after any such regulation is laid before it, praying that the regulation may be annulled, his Majesty in Council may annul the regulation, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder." The result of that is that a regulation made under the Act, if not annulled

as the result of the action of either House of Parliament, is to have effect as if enacted in the Act.

In 1928 an amending Act was passed, and it is relevant to the present purpose only in this regard, that by s. 16, sub-s. 3, the scope of regulations to be made under s. 93 of the principal Act was enlarged. It provided that to s. 75 of the principal Act the following sub-section should be added: "(7.) Regulations may be made with respect to the administration of schemes under this section and of any additional benefit, and with respect to the arrangements for the provision of any service or appliances towards the cost of which payment may be made by way of additional benefit; and any scheme providing for any additional benefit shall, except so far as the Minister may otherwise direct, have effect as if the regulations relating to the benefit were incorporated in the scheme, and the provisions of the scheme made subject thereto." There follows this proviso, on which reliance was placed by the plaintiff: "Provided that such regulations shall not restrict the right on the part of any insured person to obtain treatment from any practitioner, clinic, or other institution with whom arrangements with respect to that form of treatment have been made in accordance with the regulations."

In the case of the present approved society there was a surplus which provided room for additional benefit, and therefore it became subject to, among other things, the National Health Insurance (Dental Benefit) Regulations made under the Act in the year 1930. Reg. 2, the interpretation clause, defines "dentist" as "a person who is duly registered in the dentists' register kept under the Dentists Acts, 1878 to 1923, or any Act amending those Acts." I have already referred to the provisions, so far as they are relevant, of the Dentists Acts and explained how the plaintiff is not on the register, and accordingly is not a "dentist" within the meaning of these regulations. Reg. 21 provides: "Subject to the provisions of these regulations a member shall be entitled to obtain dental treatment from any dentist who is prepared to provide such treatment at fees not exceeding those set out in the second schedule to these regulations (hereinafter referred

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to as the 'scale fees,') not being a dentist who is for the time being declared by the Minister to be unsuitable for service in connexion with dental benefit as a result of an inquiry under the regulations."

It is clear that the plaintiff is not a "dentist" within the meaning of the National Health Insurance (Dental Benefit) Regulations, 1930. He is not on the register; he is not a dentist from whom a member of an approved society is entitled to obtain dental treatment; and he is not a person, therefore, who can send in charges and obtain payment of them from an approved society. Therefore, on these regulations as they stand, it is quite clear to my mind, that the plaintiff is not entitled to the relief which he claims, asserting, as he does, that he is a person entitled to give treatment under the regulations of the Act, and entitled, having given treatment, to obtain payment out of the funds of the society.

But then it is said that the regulations are ultra vires and void, that they are not authorized by the Act under which they purport to be made. I can see no substance whatever in that suggestion. It appears to me that they are precisely such regulations as, under the amending section of the Act of 1928, can properly be made. Reliance, as I have said, was placed on the proviso to which I will refer again—namely, that the regulations are not to "restrict the right on the part of any insured person to obtain treatment from any practitioner . . . with whom arrangements with respect to that form of treatment have been made in accordance with the regulations." I am quite unable to see how that proviso can in any way assist the plaintiff in the present case. He is not a person "with whom arrangements . . . have been made in accordance with the regulations." There is nothing in the regulations which restricts the right of Mr. Evans or of any other person to obtain treatment from any practitioner with whom arrangements have been made in accordance with the regulations. Therefore, in my view, these regulations fall precisely within the language of the Act authorizing regulations to be made. Since a suggestion was made that somehow by inadvertence persons with the qualifications of the

plaintiff have been omitted from the class of persons who may give dental treatment under the Act, I will only add this. It appears to me to be plain that, although there may be persons not on the dentists' register who are competent to give dental treatment, and although it may well be that the plaintiff himself is such a competent person, yet I can well understand the Minister, making a regulation under this Act, coming to the conclusion that it is safer in the public interest to confine the class of persons who can give dental treatment to those persons who are on the dentists' register and who have, therefore, a *prima facie* qualification. It is clear that there may be medical practitioners competent to give medical treatment who are not competent to give dental treatment, though equally there may be some such persons who are so competent. But it appears to me to be not a matter of inadvertence but a proper precaution to confine the giving of dental treatment to those persons who are dentists as defined by the regulations; persons who, for one reason or another, are actually registered on the dentists' register.

Coming to the conclusion to which I do, it is unnecessary for me to embark on a consideration of the cases to which I have been referred: *Institute of Patent Agents v. Lockwood* (1) and *Ministry of Health v. The King. Ex parte Yaffe.* (2) But if it were necessary to consider those cases I should have no hesitation whatever in coming to the conclusion that I must be bound by what was said in *Institute of Patent Agents v. Lockwood* (1) to hold that, in virtue of s. 93, sub-s. 2, of the Act of 1924, these regulations when made have effect as if enacted in this Act, and that it would not be competent for me to canvass their validity.

Holding the opinion which I do on the matters with which I have dealt, I can do no other than dismiss the plaintiff's action with costs.

Solicitors: *Hardy Bain & Co.*; *Vivian J. Williams & Co.*

(1) [1894] A. C. 347.

(2) [1931] A. C. 494.

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J.*In re* SMITH'S ESTATE : BILHAM *v.* SMITH.1937
July 2.

[1937. S. No. 1048.]

Insurance (Life)—*Policy effected by husband on his life for wife's benefit—Death of wife in husband's lifetime—Policy kept on foot by husband till maturity—Subsequent death of husband—Husband's estate entitled to lien on policy moneys for premiums paid after wife's death—Trustee's right of indemnity—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11.*

A husband took out a policy of life assurance for 1000*l.* payable after ten years or upon his earlier death and expressed to be for the benefit of his wife, therein named, under the Married Women's Property Act, 1882. Two years later, and before the policy possessed any surrender value, the wife died. The husband kept the policy on foot, paying the premiums, until it matured, when the insurance company paid the policy moneys into a deposit account in the joint names of the husband and another as personal representatives of the deceased wife. The husband having died, his widow, as his administratrix, claimed a lien on the policy moneys for the amount of the premiums paid after his first wife's death :—

Held, that, while the policy moneys belonged to the first wife's estate, in accordance with the decision in *Cousins v. Sun Life Assurance Society* [1933] Ch. 126, the estate of the husband was entitled to a lien thereon for the amount of the premiums paid by him since his first wife's death, as being money expended by him as a trustee to preserve property of a *cestui que trust*.

In re Leslie (1883) 23 Ch. D. 552 followed and applied.

SUMMONS.

By a policy of assurance dated November 28, 1924, Percy Joseph Smith insured his life with the Pearl Assurance Company, Limited, for the sum of 1000*l.* with profits. The policy was expressed to mature on November 28, 1934, ten years from its date, or on the earlier death of the assured, and to be for the benefit of the assured's wife, Mrs. Winifred Lily Smith, under the Married Women's Property Act, 1882. The annual premium payable was 114*l.* 3*s.* 4*d.* Mrs. Smith died on March 10, 1926, intestate, leaving her husband and three children surviving her. Letters of administration to her estate were granted to P. J. Smith and the plaintiff on September 1, 1927. At the date of the death of Mrs. Smith two premiums only had been paid and the policy had no surrender value. After

payment of the third premium it had a surrender value of 216*l.* The value of the policy was therefore not included in the estate duty affidavit of the administrators. At a later date, after P. J. Smith had paid the third premium and the policy had acquired a surrender value, estate duty was claimed, and paid, on 100*l.*, approximately the difference between the surrender value and one premium.

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P. J. Smith continued to pay the premiums until November 28, 1934, when the policy matured and the Pearl Assurance Company, Limited, paid to him and the plaintiff the sum of 1209*l.* in respect of the policy, and that sum was placed on deposit in a bank in the joint names.

P. J. Smith intended to make a claim to be recouped the sum of 913*l.* 6*s.* 8*d.* in respect of premiums paid by him, but he died on October 17, 1936, having appointed the defendant, Mrs. Gladys Madeleine Smith, who was his second wife, executrix of his will. She proved the will and claimed the sum of 913*l.* 6*s.* 8*d.* on behalf of her husband's estate.

The plaintiff took out this summons asking whether the defendant, Mrs. Gladys Madeleine Smith, as personal representative of P. J. Smith, was entitled to repayment out of the proceeds of the policy of all or any part of the premiums paid by P. J. Smith for the maintenance of the policy, or how otherwise the plaintiff ought to deal with the proceeds of the policy. The widow of the second marriage and the children of the first marriage were made defendants to the summons.

Beebee for the plaintiff.

Wilfrid Hunt for the defendant Mrs. G. M. Smith, executrix of P. J. Smith.

It is submitted that the present case comes under the second head of the four different classes of cases stated by Jessel M.R. in *In re Leslie* (1), where a person who has kept up a policy out of his own moneys is entitled to a lien on the policy moneys for the premiums he has paid. The husband held the policy as a trustee for the estate of his dead wife,

LUXMOORE and, though not under any covenant to do so, kept it up out of his moneys when it would otherwise have lapsed. That being so, he is entitled to a lien for all the premiums he paid after the death of his wife.

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The husband was clearly a trustee of the policy for his wife ; but at the date of her death the policy had no surrender value, and another yearly premium had to be paid before it obtained any such value. At that time there was considerable doubt on the authorities whether the policy belonged to the husband's or the wife's estate, but in *Cousins v. Sun Life Assurance Society* (1) all such doubts were settled by the Court of Appeal holding that in such a case as the present, where the policy was taken out for the benefit of the wife under the Married Women's Property Act, 1882, the policy moneys when paid formed part of the wife's estate. Having regard to the doubt on the cases at the time, the husband is prima facie entitled to a lien, on general principles, as a trustee who has spent his own money in preserving the property of the cestui que trust. Before the wife's death the husband no doubt kept the policy on foot for her benefit, but not after. Only the premiums paid after the wife's death are claimed.

Hon. B. L. Bathurst, for the infant defendants, children of the first marriage.

The policy moneys belong to the estate of the deceased wife and are not subject to any charge or lien in favour of the husband, or his estate, for any premiums paid by him. In *Cousins v. Sun Life Assurance Society* (1) at least one premium was paid by the husband after his wife's death. Anything done in regard to the policy is done for the benefit of the cestui que trust : see *In re Fleetwood's Policy* (2), where the policy was surrendered, and it was held that this was done for the benefit of the wife as cestui que trust. See also *Royal Exchange Assurance v. Hope* (3), where payments were voluntarily made to extend the term of an assigned policy. Examples of voluntary payments were given by Sargent L.J. (4)

(1) [1933] Ch. 126.

(2) [1926] Ch. 48.

(3) [1928] Ch. 179.

(4) *Ibid.* 194.

The case is the same as that of a settlement by a husband of a policy for the benefit of his wife without a covenant for payment of the premiums. Premiums paid before and after the death of Winifred Lily Smith are on the same footing, because a trust was created by the husband once and for all when the policy was taken out for the benefit of the wife and her estate. See *Cousins'* case. (1)

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LUXMOORE J. The question here is whether the estate of a husband who took out a policy of assurance on his own life for the benefit of his first wife under the Married Women's Property Act, 1882, is entitled to a lien on the policy moneys for the premiums paid by him after the death of his first wife.

The policy, which was taken out with the Pearl Assurance Company, Ltd., was dated November 28, 1924, and assured the sum of 1000*l.* with profits at an annual premium of 114*l.* 3*s.* 4*d.* The premiums were payable for ten years. The policy matured on November 28, 1934, or on the earlier death of the assured. It was expressed to be payable to the proposer or his executors, administrators, or assigns for the benefit of Mrs. Winifred Lily Smith, the wife of the assured, under the Married Women's Property Act, 1882.

It is provided by s. 11, para. 2, of that Act that: "A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them . . . shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his . . . debts: . . ."

At the date of the death of Mrs. W. L. Smith on March 10, 1926, the policy had no surrender value, and therefore was not included in the estate duty affidavit as part of her estate. The husband continued to pay the annual premiums until maturity, when the policy moneys were paid to the administrators of the wife's estate, one of whom was the husband, and were placed on deposit in a bank, pending an application

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intended to be made to determine whether the husband was entitled to a lien on the policy moneys for the premiums paid since the death of his wife. There can be no question since the decision of the Court of Appeal in *Cousins v. Sun Life Assurance Society* (1) that the policy was held in trust for the estate of the wife. The husband in the meantime died on October 17, 1936, having appointed the defendant, Mrs. G. M. Smith, his second wife, executrix of his will. She claims to enforce her late husband's lien on the policy moneys. It is admitted that the husband was under no liability to pay the premiums to keep the policy on foot. But he was a trustee of the policy and while trustee he paid the premiums to keep up the policy out of his own moneys.

It is well settled that where a person not the beneficial owner of a policy has paid the premiums on it out of his own moneys he is entitled, in certain cases, to a lien on the policy moneys for the amount so paid by him. In *In re Leslie* (2) Fry L.J. said: "In my opinion a lien may be created upon the moneys secured by a policy by payment of premiums in the following cases: First. By contract with a beneficial owner of the policy. Secondly. By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation. Thirdly. By subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property. Fourthly. By reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property."

In the present case Mr. Smith's payments appear to fall within the second of these heads, unless there is some other consideration which prevents that principle from applying to the case. It is true that the relationship between the trustee and the cestui que trust during their joint lives was that of husband and wife; but after the wife's death that relationship no longer existed. I can therefore see no answer to the claim of his personal representative to be repaid out of the

(1) [1933] Ch. 126.

(2) 23 Ch. D. 552, 560.

policy moneys the amount of the premiums, about 913*l.*, and I declare that the executrix of the late Mr. Percy J. Smith is entitled to be repaid out of the proceeds of the policy of assurance the total sum, whatever the amount is, paid by him in premiums after the death of his first wife. The costs of all parties between solicitor and client will be paid out of the policy moneys.

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Solicitors : *Henry P. Spottiswoode & Co.*

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June 22,
23, 24;
July 28.

In re DUCE AND BOOTS CASH CHEMISTS
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[1937. D. 636.]

Vendor and purchaser—Sale of land—Abstract of title—Requisitions—Will of previous owner disclosed—Son to whom land bequeathed appointed sole executor—Daughter given right to occupy land during life or spinsterhood—Vesting assent by son—Consent to land vesting in himself—No release of her right by daughter—Whether vesting assent conclusive evidence that son “entitled to have the legal estate conveyed to him”—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 36, sub-s. 7.

By the Administration of Estates Act, 1925, s. 36, sub-s. 7: “An assent or conveyance by a personal representative in respect of a legal estate shall, in favour of a purchaser, unless notice of a previous assent or conveyance affecting that legal estate has been placed on or annexed to the probate or administration, be taken as sufficient evidence that the person in whose favour the assent or conveyance is given or made is the person entitled to have the legal estate conveyed to him, and upon the proper trusts, if any, but shall not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or conveyed or any charge thereon.”

The words “sufficient evidence” in this sub-section have not the meaning of “conclusive evidence,” and, accordingly, the effect of the sub-section is that a purchaser may safely accept a vesting assent as evidence that the person in whose favour it was made was the person entitled to have the legal estate conveyed to him only unless and until, on a proper investigation of the vendor's title, facts come to his knowledge which indicate the contrary; in which event the vesting assent cannot be accepted as sufficient evidence of something which he has reason to believe is not in accordance with the facts.

ADJOURNED SUMMONS.

By a contract dated January 6, 1937, the applicant, Nathan Duce, agreed to sell as beneficial owner to the respondents, Boots Cash Chemists (Southern), Ltd., the fee-simple in possession free from incumbrances of the freehold property being No. 8, Chain Street, Reading, and the unexpired term of years in the leasehold property being No. 7, Chain Street. It was agreed that the title to the freehold property should commence with a conveyance dated May 16, 1894. The

applicant duly deduced his title to the leasehold property with regard to which no question arose. The abstracts of title furnished by the applicant disclosed the following documents touching the freehold property :

(1.) A conveyance dated May 16, 1894, whereby George Palmer and Samuel Palmer conveyed the freehold property being No. 8, Chain Street, to George Hookham (hereinafter called "the testator").

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(2.) The will of the testator dated January 20, 1920 (disclosed only in the abstract of title to the leasehold property), whereby he appointed his son George Edward Hookham to be his sole executor and bequeathed all his freehold and leasehold messuages, shops and premises being Nos. 7 and 8, Chain Street, to his said son upon trust to permit his daughter Sophia Hookham to use and occupy the dwelling-house No. 8, Chain Street, during her life or spinsterhood should she wish to do so and to pay her *1l. 10s.* a week during her life or spinsterhood and subject and charged as aforesaid for himself absolutely.

(3.) Probate of the will of the testator, who died on October 20, 1931, granted to George Edward Hookham on December 3, 1931. Thereon was endorsed a memorandum that by an assent dated April 21, 1932, George Edward Hookham "assented to the vesting in himself of the freehold and leasehold property being No. 8 and No. 7, Chain Street, Reading, respectively for all the estate vested in the testator at the time of his death."

(4.) An assent dated April 21, 1932, in the following terms :
"Whereas George Hookham, late of Chain Street, Reading, aforesaid furniture dealer (hereinafter called 'the testator') by his will dated January 20, 1920, appointed his son, the executor, to be the executor thereof and thereby devised and bequeathed all his freehold and leasehold messuages, shops and premises situate and being Nos. 7 and 8, Chain Street, Reading aforesaid unto his son, according to the tenure thereof upon trust to permit his daughter Sophia Hookham to personally use and occupy the dwelling-house at No. 8, Chain Street, aforesaid, free of rent rates and other outgoings during

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her life or spinsterhood should she wish to do so. And whereas the testator died on October 20, 1931, without having altered or revoked his said will which was duly proved by the executor on December 3, 1931, in the Oxford District Registry, and whereas the executor has duly paid and discharged all funeral and testamentary expenses, all death duties and all debts of which he has knowledge or notice and the pecuniary legacies bequeathed by the said will without recourse to the property hereinafter assured, Now the executor hereby assents to all property passing under the said will vesting in himself, the said George Edward Hookham, for all the estate vested in the testator at the time of his death, including therein all the freehold property specified in the first column of the Schedule hereto for the estate or interest expressed in the second column of the said Schedule” In the first column of the Schedule was “No. 8, Chain Street, Reading, Berks.” In the second column was : “Estate or interest vested in testator at his death : fee simple.”

(5.) A deed of release dated April 5, 1933, “Between Sophia Hookham, of No. 8, Chain Street, in the County Borough of Reading, spinster, of the one part and George Edward Hookham of the same place, furniture dealer, of the other part. Whereas George Hookham (hereinafter called ‘the testator’) late of No. 8, Chain Street, aforesaid, duly made his will dated January 20, 1920, whereby he appointed the said George Edward Hookham to be the sole executor and devised his freehold and leasehold messuages, shops and premises situate and being Nos. 7 and 8, Chain Street, aforesaid, to his son, the said George Edward Hookham and charged the same with the payment of the sum of 1*l.* 10*s.* per week to the said Sophia Hookham during her life or spinsterhood. And whereas the testator died on October 20, 1931, and his said will was duly proved by the said George Edward Hookham in the Oxford District Registry, on December 3, 1931. And whereas the said George Edward Hookham has paid the testator’s funeral and testamentary expenses and debts and legacies bequeathed by the said will. And whereas the said George Edward Hookham has assented to the vesting in himself of the said

freehold and leasehold properties. And whereas the said Sophia Hookham has agreed with the said George Edward Hookham to give such release as is hereinafter contained, Now this deed witnesseth as follows:—In consideration of the premises the said Sophia Hookham as beneficial owner hereby releases, exonerates and discharges the freehold and leasehold premises being Nos. 7 and 8, Chain Street, aforesaid from all claims and demands in respect of the annuity for 1*l.* 10*s.* per week payable during her life or spinsterhood so charged as aforesaid.”

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(6.) A conveyance dated October 26, 1935, whereby George Edward Hookham in consideration of 2000*l.* conveyed the property to the applicant.

The requisitions on title sent in by the solicitors to the respondents were answered to their satisfaction with the exception of Requisition 1, which was as follows: “It appears that under the will of G. Hookham, Sophia Hookham became either tenant for life or a person having the powers of a tenant for life under the Settled Land Act, 1925, and, therefore, she could have required a vesting assent to be executed in her favour by G. E. Hookham, the personal representative. If Sophia Hookham elected not to reside in No. 8, Chain Street, she should have concurred in the conveyance to the vendor to release her interest under the will. From the abstract of title it would seem that there has been no such concurrence. G. E. Hookham had no power to vest No. 8, Chain Street, in himself as beneficial owner and manifestly did not sell in course of administering G. Hookham's estate. The title as abstracted is, therefore, defective in this respect.” In answer thereto the applicant relied on the deed of release dated April 5, 1933.

The applicant took out the present vendor and purchaser summons under ss. 49 and 203, sub-s. 5, of the Law of Property Act, 1925, to obtain a declaration that the requisitions had been sufficiently answered and also a declaration that a good title had been shown.

Gerald Upjohn for the applicant. A good title has been shown. By s. 36 of the Administration of Estates Act, 1925, the assent

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is "sufficient evidence" that the person in whose favour it was made was the person entitled to have the legal estate conveyed to him. The question is not whether the assent was properly made, but whether the respondents can safely act on it. It is submitted that a purchaser is not concerned to inquire whether such an assent has been made in favour of the right person. "Sufficient evidence" in the sub-section has the meaning of "conclusive evidence": *Ystalyfera Iron Co. v. Neath and Brecon Ry. Co.* (1); *Lewis v. Leonard* (2); *Board of Trade v. Sailing Ship Glenpark, Ltd.* (3) The words mean much more than prima facie evidence. In the sub-section no limitation is put on their meaning as in s. 45, sub-s. 6, of the Law of Property Act, 1925. It contains nothing equivalent to the words "unless and except so far as they may be proved to be inaccurate." Accordingly, "sufficient evidence" in s. 36, sub-s. 7, must be given a much stronger meaning. The policy of the legislation of 1925 was to facilitate the making of title. This section aimed at keeping equitable interests off the register. The purchaser is not concerned to investigate the equities. He has simply to see that the legal estate devolved on the personal representative. For this purpose he will look at the probate or the administration and the indorsements thereon, but not the will; *Wolstenholme and Cherry's Conveyancing Statutes* (12th ed.), p. 1473. The probate and the assent were the only material documents. The difficulty in this case arose wholly because the assent contained a recital of the terms of the testator's will which need not have been recited at all. The fact that this aroused the suspicions of the purchasers does not alter the effect of the sub-section, which does not qualify the enactment that the assent shall be sufficient evidence by adding "unless there are recitals to the contrary." Moreover, the evidence in this case would not justify the Court in holding that the assent was in fact made in favour of the wrong person.

J. T. Edgerley for the respondents. A good title has not been made out. "Sufficient evidence" in s. 36, sub-s. 7, has not the

(1) (1873) L. R. 17 Eq. 142.

(3) [1904] 1 K. B. 682.

(2) (1880) 5 Ex. D. 165.

same meaning as "conclusive evidence": *Reg. v. Fordham* (1); *BENNETT J. Garbutt v. Durham Joint Committee* (2); *Barraclough v. Greenhough* (3); *Muller Staub Fils v. M'Bride and Williams*. (4) 1937

The sole effect of the sub-section is that a purchaser is saved from having constructive notice of something which he did not in fact know. But, if he actually does know of it, he is bound by his knowledge. When all the documents abstracted are regular, he is under no duty to make inquiries. But here that is not the case. The investigation of the vendor's title showed that by virtue of the provisions of the testator's will the land in question became on his death settled land, that his daughter, Sophia Hookham, was the person having the powers of a tenant for life, that she had not released her right to occupy the land in question free of rent, rates and taxes during her life or spinsterhood, and that at the date of the assent she was a spinster occupying that land. The purchasers were, therefore, fixed with knowledge of an equitable interest which so far as appeared had not been released. They were thus not protected beyond possibility of doubt, and the question whether or not the freehold is still subject to Sophia Hookham's rights being a disputed question of fact the Court should not force the title on the purchaser: *In re Handman and Wilcox*. (5)

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Gerald Upjohn in reply.

Cur. adv. vult.

1937. July 28. BENNETT J. [having stated the facts:] Investigation by the purchasers of the vendor's title to No. 8, Chain Street, Reading, has brought the following facts to the knowledge of the purchasers: firstly, that by virtue of the disposition which is contained in the will of George Hookham No. 8, Chain Street, Reading, became, upon the death of George Hookham on October 20, 1931, settled land by the effect of ss. 1 and 2 of the Settled Land Act, 1925; secondly, that under the disposition in the will Sophia Hookham was a person who, with respect to No. 8, Chain Street, had the powers of a tenant for life; thirdly, that Sophia Hookham had not executed any

(1) (1873) L. R. 8 Q. B. 501.

(2) [1906] A. C. 291.

(3) (1867) L. R. 2 Q. B. 612.

(4) [1925] N. Ir. R. 7.

(5) [1902] 1 Ch. 599.

BENNETT deed or instrument surrendering or releasing the right she had
 J. under her father's will to use and occupy No. 8, Chain Street,
 1937 free of rent, rates and taxes during her life or spinsterhood ;
 DUCE AND fourthly, that after April 21, 1932, on which date George
 BOOTS CASH Edward Hookham had assented in writing to the vesting in
 CHEMISTS himself of No. 8, Chain Street, namely on April 5, 1933,
 (SOUTHERN), Sophia Hookham was a spinster and was living at No. 8, Chain
 LD.'S Street.
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On these facts it is, in my judgment, plain that George Edward Hookham was not, on April 21, 1932, a person entitled to have conveyed to him the legal estate in No. 8, Chain Street, and the purchasers know it and the vendor knows it. The vendor's title depends upon the vesting assent made on April 21, 1932, by George Edward Hookham in his own favour.

The basis of the vendor's case and of his claim to the declarations that he asks the Court to make is s. 36, sub-s. 7, of the Administration of Estates Act, 1925. The relevant sub-sections of that section read as follows : “ (1.) A personal representative may assent to the vesting, in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, including the statutory power to dispose of entailed interests, and which devolved upon the personal representative. (2.) The assent shall operate to vest in that person the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased. (3.) The statutory covenants implied by a person being expressed to convey as personal representative may be implied in an assent in like manner as in a conveyance by deed. (4.) An assent to the vesting of a legal estate shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates ; and an assent not in writing or not in favour of a named person

shall not be effectual to pass a legal estate. . . . (7.) An assent or conveyance by a personal representative in respect of a legal estate shall, in favour of a purchaser, unless notice of a previous assent or conveyance affecting that legal estate has been placed on or annexed to the probate or administration, be taken as sufficient evidence that the person in whose favour the assent or conveyance is given or made is the person entitled to have the legal estate conveyed to him, and upon the proper trusts, if any, but shall not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or conveyed or any charge thereon."

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The applicant is right if, but in my judgment only if, the words "sufficient evidence" in sub-s. 7 of s. 36 have the same meaning as the words "conclusive evidence." The applicant's whole case rested on this proposition, and, in my judgment, he has not established it. It is a truism that the word "sufficient" is not the same word as and has not the same meaning as "conclusive." But before the Administration of Estates Act, 1925, the words "sufficient evidence" had found a place in Acts of Parliament and from time to time Parliament has enacted that the certificate of some person shall be sufficient evidence of some fact. There have been decisions upon some Acts that the words have the same meaning as "conclusive evidence." *Ystalyfera Iron Co. v. Neath and Brecon Ry. Co.* (1) and *Lewis v. Leonard* (2) are instances of such decisions. There are also decisions upon the same words in other Acts to the effect that they have not the same meaning as "conclusive evidence." Of such decisions *Reg. v. Fordham* (3) and *Garbutt v. Durham Joint Committee* (4) are examples.

The fact is that the proper interpretation of the words depends upon the context in which they are placed, and I think one must find some context of a compelling kind before one can decide that the word "sufficient" has the same meaning as "conclusive." Now I can find no context in the Administration of Estates Act, 1925, which affords a foundation for a decision that there ought to be placed upon the word

(1) L. R. 17 Eq. 142.

(2) 5 Ex. D. 165.

(3) L. R. 8 Q. B. 501.

(4) [1906] A. C. 291.

BENNETT "sufficient" in sub-s. 7 of s. 36 a meaning which it does not usually bear, still less for a decision that it has the same meaning as "conclusive."

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In my judgment, the meaning and effect of sub-s. 7 of s. 36 is that a purchaser when investigating title may safely accept a vesting assent as evidence that the person in whose favour it has been made was the person entitled to have the legal estate conveyed to him unless and until, upon a proper investigation by a purchaser of his vendor's title, facts come to the purchaser's knowledge which indicate the contrary. When that happens, in my judgment, the vesting assent cannot be and ought not to be accepted as sufficient evidence of something which the purchaser has reason to believe is contrary to the fact, still less so when, as in the present case, he knows it to be contrary to the fact.

For those reasons, in my judgment, the applicant is not entitled to the declarations for which he asks and the summons must be dismissed with costs.

Solicitors: *Mills & Morley, for E. H. Duce, Shoreham; Seaton Taylor & Co.*

F. H. C.

MARQUESS OF ZETLAND v. DRIVER.

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[1936. Z. 606.]

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March 18, 19,
22, 23 ;
June 30 ;
July 1, 29.

Covenant—Sale of land—Restrictive covenants—Nothing to be done if in vendor's opinion detrimental to neighbourhood—Covenant for benefit of land remaining unsold or sold by vendor or successors in title with express benefit of covenant—Part of land a mile distant—Sale of fried fish for consumption off premises—Action to restrain by vendor's successor in title—Enforceability of covenant.

In 1928 the tenant for life of certain settled lands sold and conveyed in fee-simple part of the settled land to a purchaser, who by the conveyance entered into a covenant with the vendor, declared to be for the benefit and protection of such part or parts of the settled lands “(a) as shall for the time being remain unsold or (b) as shall be sold by the vendor or his successors in title with the express benefit of this covenant,” that (inter alia) nothing should be “done or permitted thereon which in the opinion of the vendor may be a public or private nuisance or prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood.” In the Schedule, which set out this stipulation, the term “vendor” was to include, where the context so admitted, his successors in title. Certain parts of the land so described were contiguous to the land sold and others more than a mile distant. In 1929, on the death of the vendor, the plaintiff, his son, became entitled in possession as tenant in tail male to the unsold portions of the settled estates, and in 1936 he brought an action to restrain the then owner of the land sold, on which a shop had been erected, from selling fried fish there for consumption off the premises, being of opinion that this was detrimental to the neighbourhood and to his own property, though it was not sought to establish that it was a nuisance:—

Held, (1.) that the plaintiff was not a person with whom the covenant was purported to be made and, therefore, could not enforce it by virtue of s. 56, sub-s. 1, of the Law of Property Act, 1925.

White v. Bijou Mansions, Ltd., p. 610 ante, followed.

(2.) that a covenant could be made to run with land until it changed ownership on sale and thereafter only if there were an express assignment.

(3.) that inasmuch as the covenant did not touch or concern the whole of the land to which it was sought to annex it, the attempted annexation failed.

In re Ballard's Conveyance, p. 473 ante, followed.

(4.) that, accordingly, the covenant was not enforceable by the plaintiff.

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By a conveyance dated September 10, 1928, the first Marquess of Zetland, being tenant for life of certain settled estates, conveyed to David Goodswen in fee-simple a piece of land at Redcar, in Yorkshire, subsequently known as No. 200, Lord Street. Clause 2 of the conveyance provided: "The purchasers to the intent and so as to bind as far as practicable the said property hereby conveyed into whosoever hands the same may come and to benefit and protect such part or parts of the lands in the Borough Township or Parish of Redcar, in the North Riding of the County of York, now subject to the settlement (a) as shall for the time being remain unsold or (b) as shall be sold by the vendor or his successors in title with the express benefit of this covenant, covenants with the vendor that the purchaser will at all times observe, perform and keep the said stipulations contained in the second Schedule hereto." The second Schedule provided: "(a) that the property hereby conveyed shall not (except with the previous consent in writing of the vendor, which expression in this Schedule includes where the context admits his successors in title) be used for any other purpose than for the erection thereon of a shop and dwelling-house (d) that no intoxicating or spirituous liquors shall be sold from the premises and in particular that no part of the land hereby conveyed shall be used for the purpose of a club and that no act or thing shall be done or permitted thereon which in the opinion of the vendor may be a public or private nuisance or prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood."

On March 11, 1929, the first Marquess died and the first plaintiff, who succeeded to the title, became entitled in possession as tenant in tail male to the hereditaments comprised in the settled estates.

On April 2, 1935, David Goodswen conveyed to the first defendant, William Driver, in fee-simple, with notice of the restrictive covenants, the premises known as No. 200, Lord Street, on which a shop had been erected. Thereafter the

first defendant, together with the second defendant, Eric Wilson, carried on there the business of keeping an eating-house for the consumption of fried fish and other food. In April, 1936, as the result of an appeal to the North Riding Quarter Sessions, a licence was obtained authorizing the sale of fried fish at the premises for consumption off the premises. The first plaintiff formed the opinion that such sales were detrimental to the amenities of the locality and to his own property. Accordingly, on July 7, 1936, together with the second plaintiffs, the Zetland Estates Company (in whom by a conveyance dated March 5, 1927, he had vested his equitable reversionary interest), he commenced this action, claiming an injunction to restrain the defendants from using the premises for the frying of fish or other substances for consumption off the premises. No evidence was called to show that the defendants were committing a nuisance. The parties agreed that the lands, for the benefit of which the covenant was taken, included a small portion of land contiguous to No. 200, Lord Street, a number of scattered parcels of land to the north and west with houses built on them and to the south, beyond a large area covered with buildings, certain land part of which was more than a mile away.

Fergus Morton K.C. and *J. N. Gray* for the plaintiffs. The plaintiff, although not a party to the conveyance, is entitled to enforce the covenant: *In re Ecclesiastical Commissioners for England's Conveyance*. (1) Apart from any question whether the benefit runs with the land, he can enforce it by virtue of s. 56, sub-s. 1, of the Law of Property Act, 1925. (2) That subsection must be read in conjunction with s. 78, sub-s. 1, the result of which, once it is possible to identify the land intended to be benefited, is to put the owner in the position

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(1) [1936] Ch. 430.

(2) By the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 56, sub-s. 1: "A person may take an immediate or other interest in land or other property, or the

benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."

BENNETT of the original covenantee. That is the position of the present plaintiff.

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These covenants were intended to run with the land till it was sold or till some part of it was sold. Thereafter it was intended that they should not inhere in the parcels sold in the absence of express assignment. The words used were apt to attach the covenants to the land. There is nothing inherently impossible in providing that a restrictive covenant shall not pass on sale of the property to which it has been annexed without express assignment. No authority lays down that such a covenant must be made to inhere for all time. A covenant can be made to inhere in land unless and until a certain event happens: *Reid v. Bickerstaff*. (1) There is no uncertainty in the covenant. The maxim “*id certum est quod certum reddi potest*” applies.

This covenant is for the benefit of the whole land and every part of it and is enforceable: *In re Union of London and Smith's Bank, Ltd.'s Conveyance*; *Miles v. Easter*. (2) It is annexed to the adjoining houses in Lord Street. It touches or concerns them. They have remained unsold. The plaintiff is the owner. The covenant has been broken. All the necessary elements in the plaintiff's case are complete. The covenant is severable, being expressed to be for the benefit of “such part or parts” of the settled land as shall for the time being remain unsold or be sold with the express benefit of it. The words are such as to annex the benefit to every part of it. This case is, therefore, distinguishable from *In re Ballard's Conveyance*. (3) That decision, however, was wrong. First, there is no authority for the proposition that

Sect. 78, sub-s. 1: “A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.

For the purposes of this sub-

section in connexion with covenants restrictive of the user of land ‘successors in title’ shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.”

(1) [1909] 2 Ch. 305.

(2) [1933] Ch. 611.

(3) Ante, p. 473.

the covenantee must be able to show that the covenant is for the benefit of every scrap of the property. It is sufficient if it benefits the land as a whole. Secondly, if the parties to the deed containing the covenant intended to annex the benefit of the covenant to the land defined, the presumption is that the covenant touches or concerns the whole of it and the onus is on the person denying it. If the law were otherwise it would always be necessary for a plaintiff seeking to enforce such a covenant to adduce evidence that it benefited every part of the land. This has never been necessary.

Finally, the question here is not whether there has been a nuisance, but whether in the plaintiff's opinion the defendant's acts are detrimental to the locality. The form of the covenant gives the plaintiff a very wide power.

[They referred to *Rogers v. Hosegood* (1); *Tod-Heatly v. Benham* (2); and *Renals v. Cowlshaw*. (3)]

Evershed K.C. and *B. S. Tatham* for the defendants. Unless the benefit of this covenant runs with the land the plaintiff is not entitled to sue upon it. The persons who can pray in aid s. 56, sub-s. 1, of the Law of Property Act, 1925, must be a class existing and defined at the date of the covenant. That sub-section can only be invoked by a person who though not a party to the conveyance can show that he is a person with whom by that instrument the covenant was purported to be made: *White v. Bijou Mansions, Ltd.* (4); *In re Ecclesiastical Commissioners for England's Conveyance*. (5) The plaintiff is not such a person. Further, the sub-section uses the word "may" which is not imperative, but means no more than that the person defined is not disabled from suing merely because he was not named as a party in the conveyance. Sect. 78, sub-s. 1, cannot be read with this sub-section to put the plaintiff in the position of the original covenantee and enable him to enforce the covenant whether it is annexed to the land or not. All that the decision in *In re Ecclesiastical Commissioners for England's Conveyance* (5) shows is that

(1) [1900] 2 Ch. 388.

(2) (1888) 40 Ch. D. 80.

(3) (1878) 9 Ch. D. 125;

(1879) 11 Ch. D. 866.

(4) Ante, p. 610.

(5) [1936] Ch. 430, 438.

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BENNETT J. covenantees who were not parties to the deed are not necessarily debarred from taking the benefit of the covenants.

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Further, this covenant cannot inhere in the land, first, because by the express terms of clause 2 it is only temporary and not annexed once for all, and secondly, because it is of so arbitrary and uncertain a character that it cannot have the characteristics essential to a covenant capable of so inhering. If a covenant be annexed to land, the plaintiff must be capable of showing to what land it is annexed. The provision that a purchaser is only to get the benefit of the covenant if it is expressly assigned is inconsistent with its inhering in the land. Moreover, a restrictive covenant is in the nature of an easement and must be sufficiently certain for a person bound by it to know what his obligation is. There cannot be a restrictive covenant dependent upon the opinion of some person and purely arbitrary.

Further, this covenant does not touch or concern the whole land purported to be benefited and is, therefore, unenforceable: *In re Ballard's Conveyance*. (1) It cannot be said to touch or concern the plaintiff's property, which is not adjoining or neighbouring. The land at a distance could not be affected by anything done at No. 200, Lord Street, and the covenant is not severable. The comprehensive term "such part or parts" of the estate "as shall for the time being remain unsold" cannot give each small part of the estate the benefit of the covenant.

Finally, if the matter depends on the plaintiff's opinion of what is detrimental to the neighbourhood, he is performing a quasi-judicial act in making his decision and must proceed according to the principles of natural justice, giving the defendant an opportunity of stating his case. This he has not done.

[They also referred to *Drake v. Gray*. (2)]

Fergus Morton K.C. in reply.

Cur. adv. vult.

BENNETT J. [having stated the facts:] These are the

(1) Ante, p. 473.

(2) [1936] Ch. 451.

facts which give rise to the questions which have to be decided. There is no doubt that the defendant Driver purchased No. 200, Lord Street, with notice of the restrictive covenants into which his predecessor in title had entered with the first Marquess. It is now questioned whether the first plaintiff, the present Lord Zetland, not being the original covenantee, can enforce the covenants. The case was first rested on the effect of s. 56, sub-s. 1, of the Law of Property Act, 1925, and it was argued that, irrespective of any question as to whether the benefit of the covenant was annexed to and ran with the land of the covenantee, the sub-section which I have mentioned enabled the first plaintiff to sue upon the covenant entered into with his father, the first Marquess. The decision of Simonds J. in *White v. Bijou Mansions, Ltd.* (1), is in my judgment the answer to this argument. Simonds J. decided that s. 56, sub-s. 1, of the Law of Property Act, 1925, could only be called in aid by a person who, although not a party to a conveyance, or other instrument, was nevertheless a person with whom by that conveyance or instrument a covenant was purported to be made. The first plaintiff was not such a person, and I shall follow Simonds J. and hold that the provisions of s. 56, sub-s. 1, of the Law of Property Act, 1925, do not enable the first plaintiff to sue on the covenant.

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The case was then based upon the ground that the benefit of the covenant had been annexed to and ran with the land of the covenantee and that, therefore, the first plaintiff, now the owner of the lands to which the benefit of the covenant had been annexed, could enforce it. The terms of the covenant have first to be construed so as to ascertain from the language the parties have used what their intentions were, and, when the terms of the covenant have been construed, the legal effect of the words used has to be decided. The meaning of the parties is I think reasonably clear. The intention of the parties was first that on a sale by the covenantee of a portion of the lands for the benefit and protection of which the covenant was taken, the purchaser

BENNETT J. was not to get the benefit of the covenant merely by a conveyance of the land. In order that a purchaser from the covenantee might get it, there had to be an express assignment to him of the benefit of the covenant. Secondly, the parties intended that on a change of ownership of the land otherwise than on the occasion of a sale, the benefit of the covenant should pass with the land. The idea underlying the words was, I think, that the benefit of the covenant should inhere in and run with all the land for the benefit and protection of which it was taken until there was a sale of it, or of a parcel of it. When there was a sale the intention was that the benefit of the covenant should no longer inhere in the parcels sold, and that the benefit should not pass without express assignment. So far as I know the question whether a covenant can be made to run with land until it changes ownership on sale has never been judicially considered, but I see no objection in principle to parties agreeing that the benefit of a restrictive covenant shall run with the land of the covenantee until the happening of some specified event, and that thereafter the benefit shall pass only if expressly assigned. In my judgment, therefore, the first plaintiff can enforce the covenant if it be one which comes within the category of covenants the benefit of which can be made to run with the land at law.

While the present case was being argued, Clauson J. was considering the question what were the covenants the benefit of which could be made to run with the land at law. The name of the case is *In re Ballard's Conveyance* (1), and Clauson J. decided two points. The first was, that the benefit of a covenant was incapable of being annexed to land so as to run with it, unless the covenant touched or concerned the land to which it had been annexed. The second was, that if a covenant touched or concerned a part only of the land to which the parties had attempted to annex it, but did not touch or concern every part of it, the attempted annexation failed. He decided that the covenant could not be severed. The language of the learned judge is as follows: "I asked

(1) Ante, pp. 473, 481.

in vain for any authority which would justify me in severing the covenant and treating it as annexed to or running with such part of the land as is touched by or concerned with it, though as regards the remainder of the land, namely, such part as is not touched by or concerned with the covenant, the covenant is not and cannot be annexed to it and accordingly does not and cannot run with it. Nor have I been able through my own researches to find anything in the books which seems to justify any such course. In *Rogers v. Hosegood* (1) the benefit of the covenant was annexed to all or any of certain lands adjoining or near to the covenantor's land, and no such difficulty arose as faces me here; and there are many other reported cases in which, for similar reasons, no such difficulty arose. But the requirement that the covenant, in order that the benefit of it may run with certain lands, must concern or touch those lands, is categorically stated by Farwell J. in the passage I have cited, in terms which are unquestionably in accord with a long line of earlier authority. I would observe that the construction of the document and the intention of the parties to be gathered therefrom is material on the question what is the area of land to which the covenantor and the covenantee intended to annex the benefit of the covenant, or, in technical language, what is the land with which the parties intended the covenant to run; but that on the question whether in the circumstances of the case this covenant is capable of being annexed to or of running with the land to which it is sought to annex it, it is necessary first to ascertain whether in fact the covenant touches or concerns that particular land. If on the facts it appears that the covenant does not touch or concern that particular land, the only question which remains is whether by the law in regard to annexation of a covenant to land as recognized as long ago as the year 42 Edward III. (A.D. 1368) in the *Prior's* case (see *Spencer's* case (2)) such annexation can take place unless it can be predicated of the covenant that it touches or concerns the land to which it is sought to annex it. That is a question

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(1) [1900] 2 Ch. 388.

(2) (1583) 5 Co. Rep. 15b, 17b.

BENNETT J. of dry technical law on which it would not be right, at all events for a judge of first instance, to go beyond settled authority, or at all events beyond that which can logically be deduced from settled authority, though in the result the intention of the parties to the original covenant may be frustrated. As I have not been referred to and I cannot find any authority for the proposition that a covenant which it has been sought to annex to a particular area of land can be enforced by the person seised of that land, not being the original covenantee, in a case where it cannot truly be said that the covenant touches or concerns the land to which it was sought to annex it, I must hold that the attempted annexation has failed and that the covenant has not been effectually annexed to the land and does not run with it."

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The covenant which it is alleged has been broken is stipulation D in the second Schedule to the conveyance of September 10, 1928, and the breach assigned is that the first defendant has done, or permitted to be done, on the land thereby conveyed, an act which in the opinion of the first plaintiff was a public or private nuisance, and was prejudicial or detrimental to the first plaintiff and to the owners and occupiers of adjoining property and to the neighbourhood. The first question to be asked is whether that covenant entered into with respect to the user of No. 200, Lord Street, can possibly touch or concern all the land coloured red on the plan numbered 3. To touch or concern land the covenant must either affect the land as regards its mode of occupation or it must be such as per se and not merely from collateral circumstances affects the value of the land: see Farwell J.: *Rogers v. Hosegood*. (1) The covenant in question does not purport to affect the land of the covenantee as regards its occupation, and one look at the plan, I think, makes it apparent that the value of the greater part of what was owned by the first Marquess in 1928 could not be affected in the least by anything done on No. 200, Lord Street.

On these facts I am bound by Clauson J.'s decision to hold

(1) [1900] 2 Ch. 388, 395.

that the attempted annexation of the covenant to the land of the covenantee has failed. Mr. Morton urged that Clauson J.'s decision was unsupported by any authority, and ought not to be followed; but I feel sure that my duty is to follow it and leave it to a higher tribunal to say if the law is otherwise than he decided it was. To do otherwise would only be to make the law relating to the enforcement of restrictive covenants more uncertain than it already seems to be.

The result is that the first plaintiff, not being the original covenantee, not being enabled to sue upon the covenant by virtue of s. 56, sub-s. 1, of the Law of Property Act, 1925, and not being the owner of any land to which the benefit of the covenant has been effectually annexed, has no right to enforce the covenant. No attempt was made to prove that the defendants were causing a nuisance, and so the action fails. There were a number of other points raised by way of defence to the action, points of considerable difficulty as they seemed to me. The only reason why I do not express any opinion on them is, because I desire not to say one more word than is necessary to decide the case. The action fails and must be dismissed with costs.

Solicitors: *Frere, Cholmeley & Co.; Griffith & Son, for Miles, Hutchinson & Lithgow, Middlesbrough.*

F. H. C.

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J.
1937
ZETLAND
(MARQUESS)
v.
DRIVER.

CLAUSON
J.

WHELAN AND OTHERS *v.* BILLINGHAM URBAN
DISTRICT COUNCIL.

1937
June 24.

[1936. W. 577.]

Local authority—Fire brigade—Additional work as condition of employment—“Wholly and permanently” employed on “fire brigade duties”—“Professional fireman”—Fire Brigade Pensions Act, 1925 (15 & 16 Geo. 5, c. 47), s. 23, para. 2.

By s. 23, para. 2, of the Fire Brigade Pension Acts, 1925 :
“For the purposes of this Act . . . ‘Professional fireman’ means any member of a fire brigade maintained by a local authority who is wholly and permanently employed on fire brigade duties, and to whom the Police Pensions Act, 1921, does not apply :”

“Fire brigade duties” comprise only the work done by firemen as such : they do not include other duties which firemen may be called upon to do in accordance with the terms of their employment by local authorities.

Firemen who may so be called upon to do other duties, are not “wholly and permanently” employed on fire brigade duties, and therefore are not “professional firemen” within the meaning of the section.

WITNESS ACTION.

IN this action the plaintiffs, who were firemen employed in the fire brigade of the defendants, who were a local authority, claimed against the defendants a declaration that each of the plaintiffs was a “professional fireman” within the meaning of the Fire Brigades Pensions Acts, 1925 and 1929, that each of them had been a “professional fireman” within the meaning of those Acts since the dates of their respective appointments as firemen in the employment of the defendants, and that the service of the plaintiffs and of each of them respectively as professional firemen in the employment of the defendants had been approved service within the meaning and subject to the provisions of those Acts. In their defence the defendants stated that they had refused to apply the provisions of the Acts to the plaintiffs because they had been advised that the plaintiffs were not “professional firemen” within the meaning of the Acts ; and they contended that they had not power to apply the provisions of the Acts to them.

The primary duties of each of the plaintiffs were to act as

members of the defendants' fire brigade and to maintain the equipment of that brigade in a state of efficiency at any hour or time at which the defendants could require them to carry out those duties. Accordingly, arrangements were made under which the plaintiffs were available at any hour of the day or night, with the exception of certain occasional leave periods, at any moment to attend the alarm and go out with the fire brigade. Their normal working hours were, on weekdays other than Saturdays, from 7.30 A.M. to 5 P.M., and on Saturdays from 7.30 A.M. to 12 NOON. The routine was that the plaintiffs, as the brigade, with their two officers, paraded at 7.30 in the morning at the fire brigade's headquarters. Their duties were then allocated to them: one man had to be detailed to be the ambulance driver, another to be the ambulance assistant, and they had to be, and were, detailed for various duties in case of fire calls. It also happened, however, that in the normal way the members of the fire brigade would be from 7.30 A.M. to 5 P.M. at the headquarters of the brigade, and during a certain time of the day, when all the necessary routine duties had been performed, they would be doing nothing and waiting for an emergency to arise. The arrangement between the plaintiffs and the defendants was, however, that it was one of the conditions of the employment of each of the plaintiffs that he would be required to carry out on behalf of the defendants any work in the depot yard which the various heads of departments could find for him. That work was to be carried out during such time as the plaintiffs were not attending fires or drills or engaged in attending to the fire appliances. The depot yard was in the very near vicinity of the brigade headquarters. Accordingly, the officer detailed not only the various fire duties to be performed during the day, but also gave the plaintiffs directions as to the work they were to do of an additional character during the time during which they would otherwise have been idle, waiting for a call. The additional work of that character thus parcelled out was largely of such a nature that it could be performed quite close to the fire brigade headquarters, and did not interfere with the fireman's capacity to be ready at a few seconds' notice to deal with any alarm and go out

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CLAUSON and perform strictly fire duties. Occasionally one of the
J. additional duties of a fireman was to look after the mortuary,
1937 some hundreds of yards away, which would have meant some
WHELAN little delay in attending to his fire duties. There were instances
v. of that sort of work done for the defendants' benefit.
BILLINGHAM
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W. P. Spens K.C. and *Harold B. Williams* for the plaintiffs.
The question for the Court to determine is whether, on the facts, the plaintiffs are "professional firemen" within the meaning of s. 23 of the Fire Brigade Pensions Act, 1925. The difficulty arises entirely out of the definition, and the question is, What is the construction to be put on the words "wholly and permanently employed"? There is evidence as to what is the general system of fire brigades in England. At the date of the Act there were certain brigades with a staff consisting solely of permanent firemen, others with a staff partly of permanent and partly of auxiliary firemen, and, in the country, others with a staff consisting solely of volunteers. The difference between a permanent and an auxiliary fireman is that a permanent fireman is a whole-time employee of the local authority, always liable for fire brigade duties, and not available to take up any other employment which conflicts, or might conflict, with them. He is engaged as a permanent member of the fire brigade. An auxiliary fireman is engaged primarily in some occupation other than that of fire brigade duties. He is liable for those duties only if he is not following his ordinary employment (e.g., after working hours), or, where he happens to be an employee of a local authority, if he can be made available in an emergency when the fire brigade is called out.

The benefits of the Fire Brigade Pensions Act, 1925, were intended to be conferred on all whole-time permanent firemen.

In the present case it was a term of service of these permanent firemen that their available time during normal working hours should be at the local authority's disposal for such work as they could be employed in without interfering with their immediate availability for fire brigade duties. The first, and perhaps the main, question in this action is whether that term of service, and the fact that it necessitates that the plaintiffs'

spare time shall be used at the direction of the local authority, prevents the plaintiffs from being "professional firemen." The Court will appreciate the very serious nature of this action.

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There is no definition of "fire brigade duties." It is left at large, and it is that fact on which, to a great extent, the plaintiffs rely. It is left to the local authorities to decide what is the proper employment of the time of those who are employed by them as permanent firemen.

Cyril J. Radcliffe K.C. and *H. O. Danckwerts* for the defendants. This is a very short point. It is impossible to say that men who spend only a percentage of their time as firemen are "professional firemen" within the meaning of the Act. There is nothing in the Act about this particular matter. The question is merely on what scale the plaintiffs are to receive their remuneration, whether they are firemen of a kind that comes within the Act, and have the kind of employment that brings them within it. They cannot be said to be wholly employed as firemen. The central point is whether their weekly wages are for employment on fire brigade duties or on other duties as well. No one of the plaintiffs is entitled to a declaration that he is a "professional fireman" within the meaning of the Act.

W. P. Spens K.C. in reply. The matter depends on the true construction of the words "fire brigade duties." The question is whether it is possible for local authorities to stipulate that their firemen shall, as part of their duties, fill in their available time by holding themselves liable to do, on the order of proper agents of the local authorities, duties other than those of firemen. It is a reasonable construction of the Act that it is for the local authority to lay down what shall be the duties of the men employed as permanent firemen. In this case there are not two types of employment. There is one employment and one contract of service, and the local authority most reasonably says that its employees, when they are standing by, will be required to carry out, in the depot yard, any work which the various heads of departments can find for them. The men have one duty only—namely, the duty of regular

CLAUSON J. permanent firemen ; and part of that duty is that they shall do such work as they are thus ordered to do.

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WHELAN v. BILLINGHAM U. D. C. CLAUSON J. [after stating the facts:] The question is whether these firemen, so employed, are “ professional firemen ” within the definition of that term as appearing in s. 23 of the Fire Brigade Pensions Act, 1925. If they are, they are entitled to certain pension benefits under the Act ; I need not trouble about the details of them. If they do not come within that definition they are not entitled to the benefits of that Act. The definition is in these terms : “ ‘ Professional fireman ’ means any member of a fire brigade maintained by a local authority who is wholly and permanently employed on fire brigade duties, and to whom the Police Pensions Act, 1921, does not apply.” I can disregard those latter words ; nothing turns on them. What I have to concentrate upon is this : on the facts which I have stated, are the plaintiffs members of a fire brigade maintained by a local authority who are wholly and permanently employed on fire brigade duties ?

It is suggested for the plaintiffs that “ fire brigade duties ” there means what the local authority lays down as being the work to be performed by the fire brigade, and that, accordingly, additional duties which are placed upon an individual fireman in accordance with the conditions of his employment can be construed to be fire brigade duties. I do not see my way to accede to that argument. I think “ fire brigade duties ” means duties which the fireman performs as a member of a fire brigade. I am not spending time to consider the interesting question as to how far it is within the purview of a fire brigade to use their apparatus and their skill in emergencies that occur in common life, but are not necessarily connected with a fire. I am not troubling about that at all. The definition seems to me to imply that a man cannot be a professional fireman unless he is a member of a fire brigade and is employed on duties such as appertain to members of a fire brigade as members of a fire brigade.

The question with which I have to deal is this : in the particular circumstances of this case, are the plaintiffs wholly

and permanently employed on fire brigade duties? They are permanently employed on fire brigade duties in this sense, that throughout the day, whatever they may be doing with their hands, they must be ready to answer the alarm. I think it is clear that a man who is sitting waiting for an alarm, although for the moment he may be doing nothing but reading a newspaper, is employed on fire brigade duties, because it is essential that the members of the fire brigade should be immediately available for the active performance of their duties. It is one of their passive duties to be there. It would be an attractive theory at first sight to say that a man may still be permanently employed on fire brigade duties if, instead of sitting still, he is, in the immediate vicinity of the place where he can answer the call, employed in doing some other useful work. In my view he would be still permanently employed on fire brigade duties, although he might be in fact doing some work which had nothing whatever to do with the fire brigade. But in this case the plaintiffs cannot qualify to come within the Act unless they are not only permanently employed on fire brigade duties, but wholly and permanently employed on fire brigade duties. It appears to me that it is impossible for me to hold that, in this case, the plaintiffs come within that definition and can be said to be wholly employed on fire brigade duties. It is one of the conditions of the employment of each of them that he is to carry out, if so required, any work in the depot yard which various heads of departments—that means the people acting under the local authority's surveyor—find for him; in other words, he is not wholly employed on fire brigade duties. He is employed on other duties as well, which, though they may be quite compatible with the efficient performance of his fire brigade duties, are part of his employment. Accordingly, in my view, it is impossible to say of the plaintiffs that they come within the definition in the Act.

Under those circumstances, I propose to make a declaration negating the first declaration in the plaintiffs' claim, and accordingly to declare that the plaintiffs are not professional firemen within the meaning of the Fire Brigade Pensions Act, 1925.

Solicitors: *Carter & Barber; Lees & Co.*

K. R. A. H.

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J.

1937
July 9.

In re SEYMOUR.

Ex parte THE TRUSTEE.

[No. 231 of 1936.]

*Bankruptcy—Payment to creditor after commencement of bankruptcy—
Bona fides—Protected transaction—Bankruptcy Act, 1914 (4 & 5
Geo. 5, c. 59), s. 45.*

By s. 45 of the Bankruptcy Act, 1914: “. . . nothing in this Act shall invalidate, . . . (a) Any payment by the bankrupt to any of his creditors; . . . Provided that both the following conditions are complied with, namely—(i.) that the payment, . . . takes place before the date of the receiving order; and (ii.) that the person . . . to . . . whom the payment, . . . was made, . . . has not at the time of the payment, . . . notice of any available act of bankruptcy committed by the bankrupt before that time.”

On March 17, 1936, a petition in bankruptcy was served on the debtor. In May, 1936, he had two accounts with his bank, one, in use, at its Marble Arch branch, the other, dormant, at its Edgware Road branch, the latter being overdrawn by 24*ol.* 6*s.* 4*d.* and the overdraft guaranteed by a friend of the debtor. On May 5, 1936, the Marble Arch account being then overdrawn by 2*l.* 12*s.* 11*d.*, the debtor obtained 300*l.* from moneylenders, and on the next day paid 300*l.* into the Marble Arch account, withdrew 250*l.*, and paid 24*ol.* 6*s.* 4*d.* into the Edgware Road account. On July 27, 1936, a receiving order was made against him on the petition of March 17, 1936. On December 9, 1936, he was adjudicated a bankrupt, and on December 11, 1936, the appointment of the trustee in the bankruptcy was confirmed. The trustee contended that his title as trustee related back to March 17, 1936, that the debtor on May 5, 1936, knew himself to be insolvent and next day, intending to prefer the guarantor, paid into the Edgware Road account the 24*ol.* 6*s.* 4*d.*, that that money was the trustee's property, and that the payment of it was not protected by s. 45, and that the bank should pay it to the trustee.

On a motion by the trustee for a declaration that the money formed part of the debtor's estate and that the debtor's payment of it to the bank was void as against the trustee, made in bad faith, and contrary to the bankruptcy laws:—

Held, that the payment was protected by s. 45.

In re Badham (1893) 10 Morr. 252 not followed.

MOTION.

This was a motion by the trustee in the debtor's bankruptcy for a declaration that the sum of 24*ol.* 6*s.* 4*d.* paid by the debtor to Barclays Bank, Ltd., on May 6, 1936, formed

part of the debtor's estate, and that the debtor's payment of it to the bank was void as against the trustee, was made in bad faith, and was contrary to the bankruptcy laws.

On March 9, 1936, a bankruptcy notice was served on the debtor. On March 17 he committed an act of bankruptcy by not complying with the requirements of the notice, and on the same day a petition in bankruptcy was presented against him.

In May, 1936, the debtor had an account, which he was then actively using, at the bank's Marble Arch branch, and another, then and for about six months past dormant save for two transactions, at its Edgware Road branch. The Edgware Road account was overdrawn by 240*l.* 6*s.* 4*d.*, the overdraft being guaranteed by a friend of the debtor. On May 5, 1936, the Marble Arch account was overdrawn by 2*l.* 12*s.* 11*d.* On the same day the debtor obtained 300*l.* from moneylenders, and on the next day he paid 300*l.* into the Marble Arch account, withdrew 250*l.* from that account, and paid 240*l.* 6*s.* 4*d.* into the Edgware Road account, thus ending his overdraft there and the guarantor's liability on it.

On July 27, 1936, a receiving order was made against the debtor on the petition presented on March 17, 1936. His adjudication as a bankrupt followed on December 9, 1936, and the trustee's appointment as trustee in the bankruptcy was confirmed two days later.

On the motion the trustee contended that his title as trustee went back to March 17, 1936, that the debtor was to his own knowledge insolvent when he obtained the 300*l.* from the moneylenders, that on May 6, 1936, he paid the 240*l.* 6*s.* 4*d.* into the Edgware Road account in order to prefer the guarantor, that that sum was at that date the trustee's property, that the payment was in the circumstances not protected by s. 45 of the Bankruptcy Act, 1914, and that the bank ought to pay the money to the trustee.

H. J. Wallington K.C. and *V. R. Aronson* for the trustee. The motion is brought upon the principle of *In re Badham* (1)

(1) 10 Morr. 252.

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that, the policy of the bankruptcy laws being to secure the proper distribution of the bankrupt's assets among his creditors, a payment in bad faith by the bankrupt of property which, at the date of the payment, belongs to the trustee in the bankruptcy because of the relation back of his title, cannot be allowed to stand.

The payment in the present case was made before the receiving order and therefore *prima facie* would be protected by s. 45 of the Bankruptcy Act, 1914, and not open to attack. That was the very set of circumstances that arose in *In re Badham*. (1) On the true construction of s. 45 this decision was right, and the section does not apply where the payment made by a bankrupt is fraudulent. In the present case, the Court has to determine whether the debtor's dominant motive in making the payment in question was to prefer a creditor. The trustee does not for one moment suggest that the bank knew anything about the matter. *In re Badham* (1) was considered and distinguished in *In re Dunkley & Son*. (2)

The general policy of the bankruptcy laws is, first, to secure that all the assets which the bankrupt has before the petition shall be vested in the trustee in bankruptcy, and, secondly, that the realized value of those assets shall be fairly and properly distributed among the bankrupt's creditors according to their rights. In order to ascertain whether a particular payment can be allowed to stand it is necessary to see, not what the Act specifically provides as to the matters that shall be protected and those that shall not, but (in case the payment does not come within those provisions) whether the bankrupt, in making payment, has done something which he must have known to be a fraud on the creditors.

The Bankruptcy Act, 1914, was passed bearing in mind the decision in *In re Badham* (1), to which, therefore, effect should be given as a binding authority. For the purpose of seeing whether a transaction ought to be allowed to stand, the Court will look at the circumstances in which it was carried out. In the present case the payment was plainly one made by the bankrupt in the ordinary course, for the specific purpose

(1) 10 Morr. 252.

(2) [1905] 2 K. B. 683.

of depriving the general creditors of the amount and putting the whole of it into one creditor's hands. It is clear both on the facts and on the law that the money ought to be repaid to the trustee.

W. N. Stable K.C. and *Gerald Upjohn* for Barclays Bank, Ltd. Even if the payment had been made two days before the presentation of the bankruptcy petition, no Court could hold that it was made with the dominant intention or view of preferring the guarantor. The irresistible inference is, not that the bankrupt was minded to prefer the guarantor, but that his real motive was to struggle to keep afloat. The ordinary case of preference is where a man contemplates bankruptcy and pays one creditor with a view to preferring him. Here the evidence points overwhelmingly to the fact that the bankrupt was trying to avoid bankruptcy and was finding money in order to do so.

Even if it is proved that the bankrupt's object was to prefer the guarantor, the trustee cannot recover the money. *In re Badham* (1) is quite clearly distinguishable on the facts. If *In re Badham* (1) decides that, where there is nothing but payment to a creditor, after presentation of the petition, with intention to prefer that creditor, that payment can be recovered by the trustee, it is a wrong decision in law, and cannot be reconciled with *In re Dunkley & Son* (2) or with the statute. That, however, is not what that case decides. There is no indication of what the facts were on which the learned judge came to the conclusion that there was something in that case amounting to a common law fraud. In the present case there is no evidence of anything which can safely be said to amount to a common law fraud. In *In re Badham* (1) the only consideration for the payment to the creditor was the discharge, wholly or pro tanto, of the debt. In the present case the bank did much more than that : they released the guarantor.

Wallington K.C. in reply. *In re Badham* (1) is a binding authority. On the facts, the bankrupt knew perfectly well that he was insolvent, and that if he did not pay the money the guarantor would be attacked by the bank. His dominant

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In re.
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TRUSTEE,
Ex parte.

motive was to get rid of the guarantor. He could have had no other dominant motive than that, and therefore, when he made the payment in question, he made it in such a way and in such circumstances as to bring it within the principle laid down by Vaughan Williams J. in *In re Badham* (1), which is binding upon the Court.

CLAUSON J. [after stating the facts and after dealing with other points not material for the purposes of this report:] The bank's contention that s. 45 is a protection to them seems to me to be correct and to be a complete answer to the trustee's claim. The trustee bases his claim on the provisions of the Act, which make his title to the money, with which the bankrupt paid the bank, relate back to a date antecedent to the date of the payment: the trustee, in other words, can establish his claim only by referring to and invoking the aid of the Act: but s. 45 seems to me to say in plain terms that if (as is admittedly the case here) the two conditions are complied with (i.) that the payment is made before the date of the receiving order and (ii.) that the payee has no notice of any act of bankruptcy, the Act is not to be invoked in support of a claim to invalidate the payment. If the trustee cannot invoke the Act, his case must, as it seems to me, fail. The section seems to me plain: the circumstances are such as to bring its protective operation into force; and the bank has, in my view, a perfectly good defence, by virtue of the section, to the claim put forward by the trustee. If that were all I should be content to stop there, but it is not all. I have already referred to the decision of Vaughan Williams J. in *In re Badham* (1), which was cited for the purpose of supporting the proposition that s. 44, which relates to fraudulent preference, relates to payments made before the petition or, at all events, cannot relate to payments made after the petition where the petition results in a receiving order being made. That case, so far as I can see, is on all fours with the present case. It was a case where, after the petition, the bankrupt had paid certain creditors sums in discharge of their claims. The claim was put forward in the

(1) 10 Morr. 252.

first instance by the trustee as a claim based upon the fraudulent preference section. Vaughan Williams J. pointed out that that would not do and treated the claim as based, not upon fraudulent preference, but upon the title given, by the statute, to the trustee to the money in question, and the learned judge proceeded to consider the effect of the protective section (then s. 49 of the Act of 1883, and now s. 45 of the present Act). The two sections are, but for one quite trifling matter which does not affect this case, in precisely the same words. Vaughan Williams J. decided that he was free to hold that the payees in that case were not entitled to the benefit of the protective section, and he took the view that he was not bound to accord the protection of s. 49 (now s. 45) to cases which fall outside s. 48 (now s. 44). He said (1) : "It is in effect said that in every case which does not fall within s. 48 I am bound to give the benefit of s. 49. I do not agree. In my opinion I am not bound to give the benefit of s. 49 to any transaction which is contrary to the policy of the bankruptcy laws. The transaction with Messrs. Wilson, Pease & Co. is contrary to the bankruptcy laws and would have been so held long before there were any sections like these in the Acts of Parliament. It is, in effect, a common law fraud to make a payment contrary to the bankruptcy laws, and I do not intend to give the benefit of the protecting section to any such transaction. I hold that the money was the property of the trustee at the time when the bankrupt paid it away and the case does not come within the protecting section. I think I am, in so holding, giving full effect to the words of the section."

With great respect to that very learned judge, I confess I cannot bring myself to give any construction to the section which would accord with the view which the learned judge in that paragraph appears to take of the correct meaning of the section. I say that with less hesitation because the matter came before Bigham J., sitting as a bankruptcy judge, in the case of *In re Dunkley & Son*. (2) In that case Bigham J. saw his way to distinguish the facts of the case

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TRUSTEE,
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(1) 10 MORT. 252, 257.

(2) [1905] 2 K. B. 683.

CLAUSON J. before him from the facts of the case in *In re Badham* (1), although I gather that he did not find stated in the report of 1937 *In re Badham* (1) what were the circumstances present in *In re Badham* (1) which were absent in the case before him. SEYMOUR, In re. However, on that ground he distinguished *In re Badham*. (1) THE TRUSTEE, Ex parte. He certainly indicated that he felt the greatest difficulty in construing the section in the way in which Vaughan Williams J. had construed it. I need scarcely say that I express with the greatest hesitation my view of what the section means in its operation and application to the present case, as my view is not consistent with the view which Vaughan Williams J. expressed so long ago as 1893 in *In re Badham*. (1) I feel great hesitation in deciding what my duty is in the circumstances—whether I ought to take the course that Vaughan Williams J. took of refusing to accord the protection of the section, notwithstanding that I personally cannot find anything in the section which authorizes me so to refuse. It is true, as was urged upon me by Mr. Wallington on behalf of the trustee, that the section has been re-enacted in recent years in precisely the same terms as the old section, and it must, I suppose, be assumed that the Legislature had before them the view expressed by Vaughan Williams J. as to the meaning of the section. The fact of the re-enactment of the section in face of the earlier decision would be very important if the words in the section were ambiguous; but in my view the words are plain and unambiguous, and it is my duty to give them the meaning which they seem to me, on the face of them, to bear. Accordingly I propose to hold that the protective section covers the case and that the applicant, the trustee, is not entitled to the declaration which he asks. Accordingly I dismiss the motion with costs.

Solicitors: *Woolfe & Woolfe; Durrant Cooper & Hambling.*

(1) 10 Morr. 252.

K. R. A. H.

In re C. S. WILSON AND G. M. WILSON.

Ex parte F. T. D. WILSON *v.* THE TRUSTEE OF A
DEED OF ARRANGEMENT.

CLAUSON
and
LUXMOORE
JJ.

1937

April 26;
May 3, 10;
June 21.

Debt—Money lent—House and farm produce provided for creditor by debtors on account of interest—Continuous acknowledgment of debt—Claim of creditor for money lent—Whether statute barred—Limitation Act, 1623 (21 Jac. I, c. 16)—Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 1.

C. S. W. and G. M. W. (the debtors) were in partnership as farmers. Between 1923 and 1925 their brother F. T. D. W. (the claimant) advanced them a considerable sum of money. In 1924 the debtors paid the claimant a very small sum by way of interest but never made any other cash payment. The claimant at one time asked them to pay interest, but was informed that they could not do so but hoped to do so before long.

Part of the partnership assets consisted of the lease of a farm on which the debtors lived, and in 1927 it was arranged between all three brothers that the obligation to pay interest should be partially discharged by the claimant going to live by himself at the farm rent free, and being provided with farm produce without charge. This was carried out, the rent, rates and taxes in respect of the farm being paid by the debtors and the debtor living there until 1935, when the lease expired.

In that year the debtors entered into a deed of arrangement with their creditors, and the claimant claimed to be entitled to the sum lent by him between 1923 and 1925 as money advanced by way of loan.

The trustee of the deed having rejected the claim on the ground (*inter alia*) that it was statute barred, the claimant applied to the Essex County Court by way of motion for a declaration that the sum was advanced by him by way of loan to the partnership and that his claim should be admitted to proof.

The county court judge having dismissed the application on the ground that the claim was statute barred, the claimant appealed to the Divisional Court in Bankruptcy:—

Held, that the arrangement made in 1927 between the debtors and the claimant clearly indicated an acknowledgment of the existence of the debt, as it provided for the future discharge of interest in respect of it. The services rendered to the claimant in pursuance of the arrangement constituted a continuous acknowledgment of the debt, from which, as each payment was made, a new promise to pay ought to be inferred. The appeal therefore must succeed and the claim admitted to proof.

Bodger v. Arch (1854) 10 Exch. 333, 341, and *Spencer v. Hemmerde* [1922] 2 A. C. 507 followed.

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This was an appeal by a Lieut.-Colonel Francis T. D. Wilson (hereinafter called "the claimant") claiming to be entitled as a creditor under a deed of arrangement dated December 23, 1935, entered into by the debtors, Charles S. Wilson and George M. Wilson, for the benefit of their creditors and registered under the Deeds of Arrangement Act, 1914, on December 24, 1935, from a decision dated October 28, 1936, of His Honour Judge Hildesley, sitting as county court judge of the Essex County Court holden at Colchester, whereby he dismissed a motion made on behalf of the claimant dated September 30, 1936, for a declaration that a sum of 4200*l.* was advanced by the claimant to the debtors, by way of loan and constituted a valid and enforceable claim against the debtors and for an order that the trustee appointed under the said deed should admit the same to proof.

The facts were as follows :—

The debtors were for many years engaged in partnership as farmers. At various dates between November 28, 1923, and August 11, 1925, the claimant advanced to the partnership sums amounting in all to 4200*l.* On October 23, 1924, the debtors paid to the claimant the sum of 10*l.* in cash by way of interest. This was the only cash payment made by the debtors to the claimant. Towards the end of 1926, the claimant asked the debtors to pay interest on the loan, but was told by them that they were unable at that time to do so, but that they hoped to pay it before long. In January, 1927, C. S. Wilson was living in a house on Stanway Hall Farm. This farm was leased to the debtors and was included in their partnership undertaking. C. S. Wilson was at that time offered a post near Bury St. Edmunds. This proposal was discussed by the claimant and the debtors—in the words of the claimant's affidavit in support of the motion—"in relation to their liability to me, particularly for interest" and "it was eventually arranged after several discussions that, as repayment of the capital sum was not then possible, their obligation to pay me interest in respect of the several loans should be discharged or partly discharged by my

living at Stanway Hall Farm rent free and my being provided with farm produce without charge." In pursuance of this arrangement C. S. Wilson went to Bury St. Edmunds and shortly afterwards the claimant went to live at the house on Stanway Hall Farm, the rent, rates and taxes in respect of the house being paid by the debtors until September, 1935, when the lease of the farm to the debtors expired. After its expiration the claimant took a new lease of the house and from that time himself paid the rent, rates and taxes in respect of it. The value of the right to live at the house free of rent, rates and taxes was agreed at 100*l.* The claimant kept a careful record of the farm produce supplied to him under the arrangement. Its value was stated by the county court judge in the subsequent proceedings to have been about 46*l.* per annum.

In 1935 the debtors, being in financial difficulties, entered into the deed of arrangement above referred to. The claimant claimed to be entitled under the deed to the sum of 4200*l.*, being money advanced by way of loan to the partnership subsisting between the two debtors. This claim was rejected by the trustee on the ground that the money was a gift, or in the alternative that the claim was statute barred. The claimant therefore applied by way of motion to the county court of Essex holden at Colchester for a declaration that the said sum of 4200*l.* was advanced to the partnership by way of loan and constituted a valid and enforceable claim against the partnership and that the said claim be admitted to proof.

At the hearing in October, 1936, the county court judge rejected the suggestion made by the trustee of the deed of arrangement that the dominant motive underlying the arrangement was that the claimant should render substantial help in carrying on the farming business on Stanway Hall Farm so as to enable Mr. C. S. Wilson to take up the appointment at Bury St. Edmunds, and he held that the arrangement was entered into in order to provide for the discharge or partial discharge of the debtors' liability for interest on the moneys advanced by the claimant.

The arrangement under which the claimant went into

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occupation of the house and was supplied with farm produce was made at the latest in 1927, and consequently more than six years before he made his claim to prove in respect of the 4200*l.* under the deed of arrangement; but its terms were complied with from the date when it was made until the expiration of the debtors' lease in September, 1935.

The county court judge found that upon the facts as proved the arrangement was made in order to provide for some payment of interest, leaving the question of repayment of capital at large and rendering it impossible to hold that from the payments of interest in the circumstances under which they were made an unequivocal or indeed any promise could be inferred to repay the capital. He therefore dismissed the motion with costs. From this decision the claimant appealed.

J. T. Molony for the applicant. The question before the Court is the application of the Statutes of Limitation, and whether the payments in kind found by the county court judge to have been made take the case out of the statute. What is the effect of Lord Tenterden's Act of 1828?

The doctrine of part payments is relied on: a part payment of principal or interest takes the case out of the Limitation Act, 1623. On the evidence before the Court payments in kind were being made almost daily. These were equivalent to part payment of interest and amount to an acknowledgment. Such an acknowledgment need not be in writing: see Halsbury's Laws of England, 2nd ed., vol. 20, p. 636. See *Wainman v. Kynman* (1); *Foster v. Dawber*. (2) The doctrine of part performance applies here. The case of *Dowling v. Ford* (3) for part payments preventing the operation of the statute should be considered.

In *Cleave v. Jones* (4) the question in issue was whether the statute of 1828 excluded any oral evidence. The Court decided that there was nothing to prevent the giving of oral evidence of part payment. *Bamfield v. Tupper* (5) carries

(1) (1847) 1 Exch. 118.

(2) (1851) 6 Exch. 839.

(3) (1843) 11 M. & W. 329.

(4) (1851) 6 Exch. 573.

(5) (1851) 7 Exch. 27.

the law a little further, but not very much. See also *Fordham v. Wallis*. (1) The law is quite clear : it has always been that part payment of capital or a payment of interest is enough to take a case out of the statute. There may be exceptional cases in which the acknowledgment of the debt will not be inferred, as, e.g., where the debt is repudiated at the time when the payment is made, or where the payment is not voluntary ; but in the ordinary case a payment of interest acknowledges a liability to pay the capital. In the present case the acknowledgment is clear, because the interest, as interest, was for eight years paid by these debtors to the creditor. It was implicit in all the payments that the debtors were realizing their capital liability.

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If the Court takes the view that there must be some acknowledgment of the debt as well as a part payment, the position in 1927 is amply sufficient to constitute an acknowledgment within the doctrine of *Spencer v. Hemmerde*. (2)

W. N. Stable K.C. and *George Pollock* for the respondents referred to *Irving v. Veitch*. (3) The distinction between what is implied in law and what can be inferred as a matter of fact is easily made. In every single case but one, where there is a part payment within six years, from which the promise is inferred, there is some act actually done by the debtor, when he comes to make the payment, from which it is a legitimate inference of fact that there was a promise to pay the debt. Compare *Cleave v. Jones*. (4) For an acknowledgment by the defendant not being sufficient, see *Tanner v. Smart*. (5) What was done in the present case was done entirely in performance of an antecedent contract, and cuts away the ground from the contention that there was a promise to pay and part performance. When part payment is made, there must be some settlement of accounts between the parties, something to show that the liability is still on foot : *Tippets v. Heane*. (6) In *Cottam v. Partridge* (7) there was an open account between two tradesmen without any agreement that

(1) (1852-53) 10 Hare, 217.

(2) [1922] 2 A. C. 507.

(3) (1837) 3 M. & W. 90, 105, 106.

(4) 6 Exch. 573, 579.

(5) (1827) 6 B. & C. 603.

(6) (1834) 1 Cr. M. & R. 252.

(7) (1842) 4 Man. & Gr. 271.

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Cur. adv. vult.

1937. June 21. CLAUSON J. I have read and I agree with the judgment which my brother Luxmoore is about to deliver.

LUXMOORE J. On September 30, 1936, Lieut.-Colonel Francis Tyrwhitt Drake Wilson (hereinafter referred to as "the claimant") gave a notice of motion in the Essex County Court holden at Chelmsford claiming a declaration that a sum of 4200*l.* had been advanced by him by way of loan to his two brothers, Messrs. Charles Spencer Wilson and George Micklethwait Wilson (hereinafter referred to as "the debtors"), and that that sum constituted a valid and enforceable claim against them. The notice of motion also asked for an order that the trustee, appointed under a deed of arrangement dated December 23, 1935, executed by the debtors for the benefit of their creditors, should admit the claim to proof. The trustee had rejected the proof on the grounds, first, that there was no loan, and secondly, that if there was a loan, the debt thereby created was statute barred. On October 28, 1936, Judge Alfred Hildesley, sitting as county court judge, dismissed the motion with costs, holding that although the money had been lent to the debtors by the claimant, the debt was statute barred. The claimant has appealed from this order.

The facts as found by the county court judge are as follows : [His Lordship stated the facts.]

(1) (1843) 11 M. & W. 542.

(2) (1844) 12 M. & W. 510.

(3) 10 Exch. 333, 340.

(4) (1795) 6 T. R. 189.

(5) [1920] 2 K. B. 200.

The question to be determined is whether the carrying out of this arrangement is sufficient to take the case out of the Limitation Act, 1623. That Act provides that all actions of debt grounded upon any lending or contract without specialty shall be commenced and sued within six years next after the cause of action or suit and not after. The Act is silent with regard to acknowledgment or part payment, but it was established by a series of cases decided after this statute and before the Statute of Frauds Amendment Act, 1828 (commonly called Lord Tenterden's Act), was passed that a promise to pay an existing debt if given within six years before action brought was sufficient to make a new contract and thereby to avoid the operation of the statute, the existing debt being the consideration to support the promise. Such a promise might either be express or be inferred from a plain acknowledgment of the debt or from a part payment of principal or a payment of or on account of interest. If the acknowledgment was accompanied by any declaration it was necessary to consider its terms. Lord Tenterden C.J. said in *Tanner v. Smart* (1): "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be, implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule 'expressum facit cessare tacitum' apply?" With regard to payment of or on account of interest or part payment of principal the payment must take place under such circumstances that a promise to pay may be inferred in fact: see Blackburn J. in *Morgan v. Rowlands*. (2) In that case the part payment relied on was the payment under a judgment of the court in respect of interest upon a promissory note: the debtor resisted payment and only paid in obedience to the judgment. The court held that it was impossible from such a payment to infer any promise to pay the principal.

Lord Tenterden's Act of 1828 provided by s. 1 that in actions of debt grounded upon any simple contract "no acknowledgment or promise by words only shall be deemed sufficient

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(1) 6 B. & C. 603, 609.

(2) (1872) L. R. 7 Q. B. 493, 497.

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evidence of a new or continuing contract whereby to take any case out of the operation of"—among other enactments, the Limitation Act, 1623—"or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby. . . ." There is an express proviso to the section, "that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." In the present case there is admittedly no written acknowledgment of or promise to pay the debt sufficient to comply with the requirements of Lord Tenterden's Act.

The substantial question is therefore whether there has been any payment in respect of interest or of principal by the debtors within six years before the claimant made his claim to prove the debt from which a new promise to pay the debt can be implied. In considering whether there has been any sufficient payment it must be borne in mind that the payment need not be in cash. It is sufficient if the payment be made in kind in fulfilment of an agreement to that effect. The case of *Bodger v. Arch* (1) affords a good example of such payment. In that case the defendant borrowed a sum of money from the plaintiff's wife while she was sole and gave a promissory note for the debt. The plaintiff's wife died shortly after her marriage to the plaintiff, who took upon himself the management of his wife's affairs before letters of administration were granted to him. He arranged with the defendant that he should keep one of his children and in return should as part of the consideration for so doing retain the interest on the money secured by the promissory note. Accounts were settled between the plaintiff and defendant in 1839 when they signed on the back of the promissory note an acknowledgment that all interest on it had been paid up to that date. There was no subsequent settlement of account between the plaintiff and defendant, but the defendant continued to maintain the child until its death, which happened in 1848. This was within six years of the date when action was brought.

Parke B., who delivered the judgment of the Court, after pointing out that it was essential to prove a new contract for the payment of the debt with the plaintiff as his wife's administrator, said this at p. 340: "But in order to constitute a new contract, the acknowledgment or promise must be in writing, signed, by 9 Geo. 4, c. 14, or there must be a payment of part or the whole of the interest as such, or part payment of the principal of the debt sued for, due from the person paying to him to whom it was made. It must, in order to fall within the exception of that statute, be a payment which implies an acknowledgment, and consequently a promise to pay the whole debt to the plaintiff; and the reason why the effect of such payment is not lessened by the Act, is, that it is not a mere acknowledgment by words, but it is coupled with a fact: *Waters v. Tompkins* (1); *Wainman v. Kynman*. (2) This part payment need not be in money, but in any mode which the parties agree shall be treated as equivalent to a payment in money. Therefore, the settlement of accounts in 1839, whereby it was agreed between the plaintiff and defendant that the interest up to that time should be considered as paid and discharged, is such a payment as took the case out of the statute, that is, constituted a fresh contract to pay in consideration of the original debt. Since that time, there has been no settlement of accounts, and the question is, whether, as the agreement was then made, or rather continued, that for the future the maintenance of the child should be paid for in part by the interest of the note, or correlatively, that the interest of the note should be paid by maintenance of the child, and that agreement has since been acted upon, there can be considered to have been a part payment to take the case out of the statute; in other words, a fresh contract by the defendant to pay in consideration of the old debt. My Brethren are all of opinion, that the maintenance of the child, part of which took place within six years before the commencement of the suit, being the agreed mode of payment of interest, was a payment within the meaning of the exception in the 9 Geo. 4, and

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(1) (1835) 2 Cr. M. & R. 723.

(2) 1 Exch. 118.

CLAUSON consequently there must be a verdict for the plaintiff on the
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In the present case there has admittedly been no payment in cash in respect of interest within six years of the claim; but the claimant has, under the arrangement stated, been allowed to live rent free at the house until September, 1935, the rates and taxes in respect of it have been paid by the debtors, and they have from time to time down to September, 1935, supplied the claimant with such farm produce as he required. It is to be observed that the facts of this case differ from the facts in *Bodger v. Arch* (1) in that the services referred to were rendered to the claimant himself, while in *Bodger v. Arch* (1) they were rendered to the infant and not to the creditor. This difference disposes of the personal doubts expressed by Parke B. with regard to the opinion arrived at by the rest of the Court. The material passage in his judgment is as follows: (2) "I must say, however, that I greatly doubt whether such a payment as this does amount to a new promise, founded on the old consideration, so as to make the defendant liable. If so, there would be a perpetual series of new contracts in consideration of the old debt, *de die in diem*, by every supply of food or raiment to the child, none of them made to *the plaintiff* or his agent, none implying an acknowledgment to him of the principal money being still due, and a consequent promise to pay it to him. I should have thought a payment to revive the old debt, must be a payment to the plaintiff or his agent, accompanied by an express promise to pay him the principal, or an acknowledgment to the plaintiff from which such a promise could be implied."

If the arrangement in 1927 was on its proper construction an agreement to satisfy the interest in kind, the continued carrying out of its terms would on the authority of *Bodger v. Arch* (1) entitle the Court to infer a new promise to pay the debt from each act done in accordance with it. The county court judge has not taken this view. He has first considered the arrangement itself and has held that if it had been in writing, it would not have constituted an acknowledgment from

(1) 10 Exch. 333.

(2) Ibid. 341.

which any promise to pay the principal could be inferred; and he has treated the arrangement to satisfy the interest on the debt in the manner agreed as having no reference to the principal of the debt. The material passage in his judgment is: "As regards the principal the matter stands as follows: In para. 5 of his affidavit the applicant says: 'towards the end of 1926, I asked the debtors about payment of the interest then due to me, but I was told that they could not pay the interest then but hoped to do so before long.' In that paragraph no reference is made to any question of repayment of principal except that: 'I anticipated that eventually they would be able to redeem their liability to me in respect of both capital and interest.' I have already referred to para. 6 in which occurs the phrase 'as repayment of the capital sum was not then possible.' In para. 7 he refers to the position after Mr. C. S. Wilson had moved to Bury St. Edmunds, and says: 'I was aware that the debtors were not in a position to repay me my loans and I did not press them to do so, but it was never in question that when things improved they would discharge the whole of their obligations to me for capital and interest less what I had received in kind.' It may be observed that all these discussions took place before the Statute of Limitations could come into operation. In cross-examination, Mr. Pollock, fortified by his knowledge of the facts of *Tanner v. Smart* (1), elicited in answer to a question the answer that 'when I went to the farm in 1927, as regards repayment of capital the partnership could not pay the debt, but would pay it at some time if they could.' "

In my judgment the arrangement made in 1927 clearly acknowledges the existence of the debt, for it provides for the future discharge of interest in respect of it. There is no condition as to payment at a future time nor is there any refusal to pay the debt, though there is a statement of present inability so to do. It seems to me that the arrangement falls within the decision of the House of Lords in *Spencer v. Hemmerde*. (2) In that case the debtor had written letters which acknowledged the existence of the debt and in doing so

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(2) [1922] 2 A. C. 507, 516.

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had said in substance : “ It is not that I won’t pay you although I see no prospect of being able to pay the capital at the present time.” Lord Cave said in the course of his judgment : “ Are the words, ‘ I can’t do so,’ and the statement that the writer sees no prospect of being able to pay the capital at present, so inconsistent with a promise to pay that they negative the implication of such a promise ? I do not think they are. There is no promise to pay on a future date, or on the fulfilment of a condition, and still less is there a refusal to pay at all. There is only a profession of present inability to carry out the promise which is implied. It is urged that, when a man couples his acknowledgment of a debt with a statement that he cannot pay, it is difficult to read into his acknowledgment a promise that he will pay ; and no doubt there is force in this observation, which appears to have commended itself to the Court of Appeal, both in this case and in the case of *Fettes v. Robertson*. (1) But it does not appear to me that the two things are really inconsistent. A debtor may well say at one and the same time : ‘ I admit my obligation and promise to discharge it,’ and ‘ I do not discharge it now, because I have not the money to do so.’ The important thing is that the present obligation to pay is admitted and the original promise to pay is renewed and affirmed without condition or qualification ; and if that be done, there is a new promise to pay upon which an action may be founded.”

The facts in the present case are I think more favourable to the creditor than those in *Spencer v. Hemmerde* (2), because the arrangement provides for payment on account of interest which re-enforces the acknowledgment and affords an additional ground for the implication of a new promise to pay. In my judgment the county court judge was in error in coming to the conclusion that if the arrangement had been in writing given within six years of the claim it would not have constituted an acknowledgment sufficient to take the case out of the operation of Lord Tenterden’s Act. It is true that if it had been in writing, the acknowledgment thereby given would have been inoperative, because it would have been given more

(1) (1921) 37 Times L. R. 581.

(2) [1922] 2 A. C. 507.

than six years before the making of the claim ; but the services rendered to the claimant in pursuance of the arrangement constitute a continuous acknowledgment of the debt from which, as each payment was made, a new promise to pay the debt ought on the authority of *Bodger v. Arch* (1) to be inferred. With all respect to the county court judge, I think he was wrong in refusing to make the necessary inference.

For these reasons I think the appeal should succeed and that the trustee of the deed of arrangement should be directed to admit the claimant's proof in respect of the 4200*l.*

CLAUSON J. The order will, in accordance with the notice of motion, be as follows : a declaration that the sum of 4200*l.* advanced by the creditor to the debtors by way of loan constitutes a valid and enforceable claim against the debtors, and an order that the trustee appointed under the deed of arrangement shall admit the same to proof. The trustee must pay the costs of the creditor before the county court judge and here, and the sum of 20*l.* paid into Court will be paid out to the applicant.

Solicitors : *Wilberforce Allen & Bryant, for F. S. Collinge & Co., Colchester ; Corbin, Greener & Cook, for Thompson, Smith & Puxon, Colchester.*

(1) 10 Exch. 333.

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